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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

CHARLES D. "CHARLEY" WILSON

Petitioner

vs.

JAMES G. HARLOW, JR., G.W. "BILL" SWISHER, JR., JOHN F. SNODGRASS, MARTHA A. GRIFFIN, JOHN A. TAYLOR, HERBERT W. CHAMPLIN, WILLIAM D. LITTLE, JR., F. DAIL HARPER, and HUGH L. HEMBREE, III

Respondents

On Petition for a Writ of Certiorari to
Supreme Court of the State of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an interlocutory appeal from a class certification order the Supreme Court of Oklahoma by order directed that briefs be limited to the issues presented by the class certification order. The respondents ignored the order and filed a 50 page brief only 7 pages of which were devoted to the class certification issues. The other 43 pages addressed jurisdictional issues previously decided adversely to respondents. In keeping with the court's order, petitioner did not brief the jurisdictional issues. Without extending petitioner notice or an opportunity to be heard on the jurisdictional issues the court decided the case on the briefs and adopted the brief and argument of the respondents on the jurisdictional issues and decided the case adversely to petitioner.

The question presented is:

Did the described internal procedure utilized by the Supreme Court of Oklahoma deprive petitioner of procedural Due Process of Law under the Fourteenth Amendment to the Constitiution of the United States?

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Respondents

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

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PETITION FOR WRIT OF CERTIORARI

Charles D. "Charley" Wilson petitions this court for a writ of certiorari to review the judgment of the Supreme Court of Oklahoma in this case.

OPINION BELOW

The not yet reported opinion of the Supreme Court of Oklahoma (App. *infra,* 1a-15a) is set forth in full in the Appendix.

JURISDICTION

The opinion and judgment of the Supreme Court of Oklahoma was entered on July 13, 1993. Petitioner's timely petition for rehearing was denied October 5, 1993. This court's jurisdiction rests on 28 U.S.C.)(1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

No State shall ****** deprive any person of ****** property without due process of law ******

U.S. Const. Amend. XIV.

STATEMENT OF CASE

Oklahoma Gas & Electric Company is the largest public utility in the state of Oklahoma supplying electrical service to some 600,000 Oklahoma ratepayers within the state of Oklahoma and an appreciable number of users in western Arkansas. The respondents constitute the Board of Directors of OG&E at the times relevant in this lawsuit.

In late 1985, OG&E entered into a contract termed a Power Sales Agreement with AES wherein AES would construct a $500 million coal-fired cogeneration plant in LeFlore County, Oklahoma, and OG&E would accept the production from this plant.

Petitioner commenced this class action lawsuit in state district court in December, 1988, seeking money damages against the respondents for common law negligence arising from the discharge of the board's duties concerning the construction of the cogeneration plan.

From day one the issue in the lawsuit was that of subject matter jurisdiction of the state district court to entertain the lawsuit. On three separate occasions the jurisdictional questions were presented to the Supreme Court of Oklahoma during the ensuing years and on each occasion the petitioner prevailed. Finally, on the fourth time up, in an appeal from a class certification order, the respondents prevailed and the case was dismissed for want of subject matter jurisdiction. Petitioner's petition for rehearing was denied.

EVENTS GIVING RISE TO PETITIONER'S CLAIM

The issue on the petition for rehearing and the issue in this petition for writ of certiorari is whether the internal procedure of the Supreme

Court of Oklahoma leading up to the promulgation of its opinion in the case was such as to deprive petitioner of procedural due process of law.[1]

In order that this issue may be brought into focus it is necessary to look at events found outside the opinion for nowhere in the opinion are these events discussed. Facts and events outside the opinion which give rise to petitioner's claim are:

(a) On August 11, 1992, the respondents filed an interlocutory appeal from the trial court's class certification order. The papers effecting the appeal disclosed the respondents intended to raise previously decided issues going to the jurisdiction of the trial court to entertain the case. On the same day the respondents filed a motion for permission to file a 50 page brief.

(2) Immediately, on August 14, 1992, petitioner filed a response to the motion to enlarge brief. (App., *infra*, 22a). Petitioner pointed out in this response that much of what respondents intended to bring to the court in the interlocutory appeal had long since been presented to and passed on by the court many times.

At this point it is essential the tracking language between the last paragraph of petitioner's response and the subsequent order of the court concerning content of the briefs be noted.

The last paragraph of petitioner's response to motion to enlarge brief read: (App., *infra*, 23a).

> "The appellants may need more than a 30 page brief to say whatever they have to say about the class action certification issue in this appeal. However the court should inform appellants that their brief *should be limited* to the question of class action certification and

[1] The merits of the court's opinion are not in issue in this petition. We do note, however, footnote 6 of the opinion which discloses that failure to give notice to petitioner was not inadvertent or an oversight on the court's part. The footnote discloses that petitioner had "specifically declined" to address the issues in his answer brief. No place does the opinion mention that the number one reason that petitioner had failed to "address" the merits of the subject matter jurisdiction was because the court had ordered such not be done in its August 18, 1992, order.

that the court has no need or desire to plow the same ground over on issues already decided adversely to the appellants. *Emphasis supplied.*

Four days later, on August 18, 1992, the court directed the clerk to enter the following order: (App., *infra*, 25a)

"On written application and agreement of the parties, appellants are granted leave t (sic) file by August 31, 1992, brief in chief of 50 pages in length. Brief is to be *carefully limited* to issues before the court in this appeal. Appellee is granted leave to file his answer brief of comparable length." *Emphasis supplied.*

(4) Notwithstanding this specially tailored order going to the content of their brief, the respondents proceeded to file a 50 page brief, only 7 pages of which were devoted to the class action issues while the other 43 went to the jurisdictional questions.

(5) Included within his answer brief, petitioner filed a motion to strike respondents' brief for a willful violation of the court's order of August 18, 1992. (App., *infra*, 26a) In his answer brief, petitioner assigned the limitations placed on the briefs by the August 18, 1992, order as his number one reason for not briefing these questions. (App., *infra*, 27a).

(6) Thus the matter stood on briefs before the court. The only communication petitioner received from the court during the 11 months the appeal was before the court was dated October 16, 1992, and informed the parties that the Supreme Court was going to retain the case and not assign it out to a Court of Appeals. Petitioner received no notice whatever that the court was even considering modifying the August 18, 1992, prohibiting the briefing of the jurisdictional issues. Petitioner was not noticed or offered an opportunity to respond and brief the jurisdictional issues.

(7) On July 13, 1993, the Supreme Court of Oklahoma promulgated and issued the opinion herein. Petitioner's motion to strike respondents' brief (App., *infra*, 26a) was ignored and was not mentioned or ruled upon. The opinion makes no mention of the August 18, 1992, order

limiting the subject matter of the briefs. The opinion does disclose the court adopted virtually in toto the brief and argument of the respondents on the jurisdictional questions in dismissing the case.

STAGE AT WHICH FEDERAL QUESTION RAISED

Under the circumstances of this case the federal question involved in this petition did not arise or at least was not known to the petitioner until the opinion was promulgated on July 13, 1993. Upon receipt of a copy of the opinion, the petitioner filed a timely petition for rehearing wherein he requested the Supreme Court of Oklahoma to withdraw the opinion and render the opinion of no effect and void on the grounds that petitioner had been deprived of procedural due process of law under the Fourteenth Amendment. (App., *infra,* 16a-20a).

As previously stated the court denied the petition for rehearing without comment. (App., *infra,* 21a).

REASON FOR GRANTING THE PETITION

The internal procedure utilized by the Supreme Court of Oklahoma leading to the promulgation of the opinion and the refusal of that court to grant a rehearing and withdraw the opinion after the constitutional infirmity was pointed out to the court through the petition for rehearing postured the court in the position of deciding a federal question that conflicts with the applicable decisions of the Supreme Court of the United States.

ARGUMENT

The Supreme Court of Oklahoma is bound by the procedural requirements of the Due Process of Law Clause of the Fourteenth Amendment. *United States v Raines,* 362 US 17, 14 L Ed2 524, 80 S Ct 519 (1960). Petitioner's cause of action is a property interest that is entitled to the protection of the Due Process Clause of the Fourteenth Amendment. *Mullane v Central Hanover Bank & Trust,* 399 US 306, 94 L Ed 384, 70 S Ct 652 (1950); *Tulsa Collection Service v Pope,* 485 US 478, 99 L Ed2 565, 108 S Ct 1340 (1988). The lack of due process of

law leading to the promulgation of the opinion requires that the opinion be completely withdrawn and voided and the *slate wiped absolutely clean* restoring petitioner to the position he occupied had due process been afforded him in the first place. *Armstrong v Manzo,* 380 US 545, 14 L Ed2 62, 85 S Ct 1178 (1965); *Peralta v Heights Medical Center, Inc.,* 485 US 80, 99 L Ed2 75, 108 S Ct 896 (1988).

Whatever the outer limits of the Due Process of Law Clause of the Fourteenth Amendment one central core component that remains absolutely constant is that notice and opportunity to be heard appropriate to the nature of the case must be provided. The case that is repeatedly cited by this court dealing with notice and an opportunity to be heard is *Mullane v Central Hanover Bank & Trust,* supra, where this court said:

> "many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

The "nature of the case" herein is a Two Billion Dollar lawsuit brought against the Board of Directors of a public utility for common law negligence. The critical question of law related to the jurisdiction of the district court to entertain the lawsuit. If one pauses and thinks about it, what happened here is truly bizarre. The Supreme Court of Oklahoma, aware that the critical questions of law going to jurisdiction were determinative of the case, proceeded to promulgate its opinion by deciding the questions of law in favor of the respondents and against the petitioner without extending to petitioner any notice or opportunity to present his side of the law.

The court was aware that the petitioner, in keeping with the court's order, had not briefed these issues. At some point, while the court had the case under consideration, procedural due process of law dictated that petitioner be given notice and an opportunity to be heard on the jurisdictional issues as set forth in the brief of the respondents. The failure of the court to do so cannot be designated as of no consequence. In the three previous occasions when the identical issues had been presented in the identical language and briefed by both sides (save for PURPA which

had only been up two times) petitioner had prevailed each time by a substantial majority vote of the court.

Procedural due process mandated some action by the court modifying its previous order of August 18, 1993, thus authorizing petitioner to brief the jurisdictional issues. A two line order and a 29¢ stamp would have bestowed on petitioner due process of law in this case. Neither was forthcoming. The Supreme Court of Oklahoma clearly had a major lapse in internal procedure with disastrous consequences to the petitioner and deprived him and 600,000 ratepayers of due process of law. The petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CHARLES D. "CHARLEY" WILSON,

Appellee,

vs.

JAMES G. HARLOW, JR., G.W. "BILL" SWISHER, JR., JOHN F. SNODGRASS, MARTHA W. GRIFFIN, JOHN A. TAYLOR, HJERBERT N. CHAMPLIN, WILLIAM D. LITTLE, JR., F. DAIL HARPER and HUGH L. HEMBREE, III,

Appellants.

INTERLOCUTORY APPEAL
FROM THE DISTRICT COURT OF MUSKOGEE COUNTY
THE HONORABLE JAMES E. EDMONDSON,
DISTRICT JUDGE

Appellee filed this suit on behalf of all Oklahoma retail customer/ ratepayers of Oklahoma Gas and Electric Company, alleging that appellants breached a common law fiduciary duty to ratepayers by failing to rescind OG&E's Amended Power Sales Agreement with AES Shady Point, Inc. Appellants were members of the Board of Directors of OG&E when the agreement was approved by the Corporation Commission. Appellee's motion to certify and maintain this cause as a class action was granted by the trial court. In this interlocutory appeal, appellants assert that the trial court erred in refusing to dismiss this case for lack of subject matter jurisdiction and in granting appellee's motion to certify this matter as a class action.

ORDER OF THE DISTRICT COURT VACATED.
CASE DISMISSED FOR LACK OF
SUBJECT MATTER JURISDICTION.

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WATT, J.:

SUMMARY OF FACTS AND PROCEDURAL HISTORY

In an effort to encourage the development of cogeneration and small power production facilities, and to reduce the demand for fossil fuels, the United States Congress enacted the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub. L. 95-617, 92 Stat. 3117 (codified

as amended at 16 U.S.C. § 824a-3).[1] The Federal Energy Regulatory Commission ("FERC") was charged with promulgating rules implementing PURPA. 16 U.S.C. § 824a-3(a). One of the ways Congress chose to encourage the development of cogeneration and small power production facilities was to require electric utilities to purchase electric energy from such facilities.[2] Pursuant to 16 U.S.C. § 824a-3(f)(1) and 18 C.F.R. § 292.401(a), the State of Oklahoma designated the Corporation Commission as the state regulatory agency responsible for implementing and enforcing PURPA. Title 17 O.S. 1981 § 34.1 provided:

> The Commission shall have the power to implement and administer the Public Utility Regulatory Policies Act . . .
>
> The Corporation Commission shall adopt such rules and regulations as are necessary to implement the purpose of all federal laws which are administered or enforced by the Corporation Commission.[3]

In 1985, Oklahoma Gas and Electric Company ("OG&E"), a publicly held utility, entered into an Amended Power Sales Agreement

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[1] Cogeneration plants not only produce electricity, but steam or heat that can be used for industrial or commercial purposes. Congress found that such plants are inherently more efficient than typical generating plants that do not use residual energy. See American Paper Inst., Inc. v. American Elec. Power Serv. Corp., 461 U.S. 402, 404-5, 103 S. Ct. 1921, 1924, 76 L.Ed.2d 22 (1983); Federal Energy Regulatory Comm'n ("FERC") v. Mississippi, 456 U.S 742, 750, 102 S. Ct. 2126, 2132, 72 L.Ed. 2d 532 (1982).

[2] Title 16 U.S.C. § 824a-3(a)(2) directed FERC to prescribe rules which "require electric utilities to offer to purchase electric energy from [qualifying cogeneration and small power production] facilities." In response, FERC mandated that "electric utilit[ies] shall purchase, in accordance with [applicable rate rules], any energy and capacity which is made available from a qualifying facility . . ." 18 C.F.R. § 292.303(a) (1984) (emphasis added).

[3] Section 34.1 was amended in 1987, but the amendments do not alter the substance of the above quoted provision.

("Contract") with AES Shady Point, Inc. ("AES"). Under the Contract, AES agreed to construct a 500 million dollar coal-fired cogeneration plant in LeFlore County, Oklahoma, and OG&E contracted to purchase all electricity generated by the facility for a period of 17 to 32 years. At the time the Contract was executed, the named appellants in this action were members of the Board of Directors of OG&E. The appellee, Charles D. "Charley" Wilson, is a customer/ratepayer of OG&E.

In accordance with PURPA and Corporation Commission rules, the Contract was submitted to the Commission for approval. After a hearing on September 20, 1985, a hearing officer recommended that the Contract be approved. Among other things, the hearing officer found that the proposed project would "avoid 300 MW [megawatts] of baseload capacity which OG&E would have built to meet the needs of its customers" and that "[a]pproval of the agreement . . . will result in direct savings to ratepayers of OG&E of approximately $1,090,000,000." In other words, according to projections at that time, approval of the Contract would allow OG&E to forego constructing facilities it would otherwise have had to build to meet the predicted electric energy demands of its customers and would save ratepayers an estimated one billion dollars.

On February 27, 1986, the Commission adopted the report of the hearing officer in its entirety and approved the Contract in Order No. 293731. The Commission found that the rates set forth in the Contract were "fair, just and reasonable, are in the best interests of the ratepayers, and are not discriminatory against either AES or OG&E." At the request of AES and acquiescence of OG&E, the Commission waived its Rule 58(H) for purposes of the approval proceeding. Such rule would have required the Contract to contain a provision empowering the Commission to later reopen the Contract, after proper notice and hearing, and alter its terms or otherwise finalize experimental purchase tariffs and special contracts. In the absence of such a "reopener" clause, the initial rates approved by the Commission were locked in for the life of the Contract. The record indicates that AES could not have secured financing for their venture without the Rule 58(H) waiver. As approved, the amounts paid to AES by OG&E under the Contract are passed on to OG&E's Oklahoma retail customers.

Although Commission Order No. 293731 was not appealed, Wilson has twice collaterally attacked the order to no avail. On May 1, 1990, Wilson sought an injunction in LeFlore County District Court to prohibit OG&E and AES from performing under the Contract. He contended that the Commission's waiver of Rule 58(H) was invalid and that the Commission lacked jurisdiction to issue the order due to inadequate notice of the hearing. The district court held the order valid and the Court of Appeals affirmed. *Wilson v. OG&E and AES*, Case No. 78,230 (Okla. Ct. app. Nov. 24, 1992) (unpublished opinion). This Court denied certiorari on March 17, 1993.

On March 4, 1991, Wilson commenced a proceeding before the Commission in which he sought vacation of the Commission's Order No. 293731. Again, he urged invalidity of the Rule 58(H) waiver and insufficiency of the hearing notice. The Commission dismissed Wilson's application with prejudice and the Court of Appeals affirmed. *Wilson v. Corp. Comm'n.*, Case No. 77,7671 (Okla. Ct. App. Nov. 10, 1992) (unpublished opinion). Wilson filed no motion for rehearing or petition for writ of certiorari.

Wilson filed the instant action in Muskogee County District Court on December 19, 1988. He has alleged that the Directors breached a common law fiduciary duty to all Oklahoma ratepayers of OG&E by (1) acquiescing to the Commission's waiver of Rule 58(H), (2) allocating all Contract payments to OG&E's retail Oklahoma ratepayers over the first five years of the Contract, and (3) failing to rescind the Contract when it became apparent that the proposed facility was no longer needed or feasible. Wilson seeks in excess of two billion dollars in damages, which he claims is the amount ratepayers will pay over and above those rates which otherwise would have been paid during the life of the Contract and in the absence of the new facility.

The present suit, as well as Wilson's two previous actions, emanate from OG&E's revelation that the entire burden of the Contract will be borne by Oklahoma ratepayers, while the total production from the AES facility will be transmitted into the State of Arkansas. (Arkansas ratepayers make up some 14% of OG&E's customers). OG&E also announced that

the cost to its Oklahoma ratepayers for the venture would be $532,898,000 over and above their ordinary electric bills for the five years commencing in 1991 through 1995. In 1988, OG&E's chief operating officer testified that a number of factors had arisen which made the construction of the plant infeasible, unnecessary and unneeded. He opined that the company did not need the production from the AES plant, could not use it before the year 2008, and even if needed then such production could be purchased elsewhere at a cheaper price. Finally, in May of 1987, approximately eight months before construction of the AES facility was started, Congress repealed the federal law prohibiting the construction of natural gas-fired plants. Wilson asserts that gas-fired plants can be constructed at one-third the cost of coal-fired plants and that the AES plant is located approximately 25 miles from one of the most prolific natural gas fields in the western world.

After several trial court rulings and interlocutory appeals,[4] the district court granted Wilson's motion to certify and maintain this cause as a class action on behalf of all Oklahoma retail customers/ratepayers of OG&E.

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[4] On March 21, 1989, the district court granted the Directors' motion to dismiss for lack of subject matter jurisdiction, holding that this cause was within the exclusive jurisdiction of the Commission. On November 6, 1990, in Case No. 72,951, the Court of Appeals reversed and remanded, holding that the case was not ripe because no payments had been made by OG&E to AES. As of that date, there had been no rate increase to ratepayers which could be the subject of Commission action. The appellate court also rejected the Directors' argument that Wilson's claim was actually a request for a rate refund governed by Commission rules. This Court denied certiorari on March 15, 1991.

After completion of the AES facility and the beginning of payments by OG&E to AES in February of 1991, the Directors filed an amended motion to dismiss for lack of subject matter jurisdiction. The district court denied the motion in orders dated October 4 and 17, 1991. The Directors' motion to dismiss on the grounds that this matter is preempted by PURPA and the Filed Rate Doctrine was denied by the district court on December 16, 1991. On December 23, 1991, the district court certified its October and December orders for interlocutory appeal. The Directors filed with this Court an application to assume original jurisdiction (Case No. 79,192) and a petition for writ of certiorari (Case No. 78,917) to review the district court's orders. On June 11, 1992, we denied both matters without opinion.

On August 11, 1992, the Directors filed this interlocutory appeal urging reversal of: (1) The district court's December 16, 1991, order denying their motion to dismiss for lack of subject matter jurisdiction based upon federal preemption; (2) the district court's July 13, 1992, order determining that this cause be certified and maintained as a class action; and (3) the November 6, 1990, opinion of the Court of Appeals in Case No. 72,951.[5]

ISSUE

The determinative issue in this appeal is whether the district court has subject matter jurisdiction to proceed. We hold that it does not. We conclude that Wilson's petition, as amended, fails to state a claim upon which relief can be granted. Oklahoma does not recognize a common law fiduciary duty on behalf of the Directors to the ratepayers of OG&E. We also find that any such cause of action, if recognized, would be preempted by PURPA and FERC regulations under the facts of this case. Finally, because this matter is essentially a rate refund case, we hold that jurisdiction lies exclusively with the Commission. The district court's July 13, 1992, order is vacated and this case is remanded with instructions to dismiss for lack of subject matter jurisdiction.

I.
PROPRIETY OF SUBJECT MATTER JURISDICTION INQUIRY

As a preliminary matter, we must address Wilson's argument that the issue of subject matter jurisdiction cannot be raised or addressed in this proceeding. Wilson asserts that this Court's review must be strictly limited to determining whether the prerequisites for class action certification, as set forth in 22 O.S. 1991 § 2023, were satisfied in the district court. We disagree. "[W]hether a trial court has jurisdiction over subject-matter of a cause is of primary and fundamental importance and *may be raised at any time.*" *Board of County Comm'rs v. City of Norman,* 472 P.2d 910, 913 (Okla. 1970) (emphasis added). *See also Woods Petroleum Corp. v. Sledge,* 632 P.2d 393, 394 (Okla. 1981). Furthermore, this Court has a duty to inquire into the jurisdiction of the trial court, even in the absence of a request by one of the parties. *Dickson v. Dickson,* 637

[5] *See* case history in note 4.

P.2d 110, 112 n.2 (Okla. 1981). Unlike the previous attempts by the Directors to have this Court address the issue of subject matter jurisdiction, the present interlocutory appeal is brought as a matter of right.[6] *See* 12 O.S. 1991 § 993(A)(6). We must therefore inquire into the district court's subject matter jurisdiction at this time.

In making the above ruling, we specifically reject Wilson's argument that this Court cannot consider the issue of subject matter jurisdiction because that issue was settled by the Court of Appeals in its October 6, 1990, opinion. *See* note 3. As a general rule, where an appellate court rules upon an issue, that ruling becomes the "law of the case" and controls all subsequent proceedings. However, the "law of the case" doctrine is not controlling "where the facts and issues are different in a subsequent appeal from what they were in the former appeal." *Grand River Dam Authority v. Grand-Hydro*, 201 P.2d 225, 227 (Okla. 1947), quoting *Missouri Kansas & Texas Ry. Co. v. City of Tulsa*, 113 Okla. 21, 238 P. 452, 456 (1925). Furthermore, this Court has held that:

> [A]n appellate court may review and reverse its former decision in the same case where it is satisfied that gross or manifest injustice has been done by its former decision, or where the mischief to be cured far outweighs any injury that may be done in the particular case by overruling a prior decision.

Smith v. Owens, 397 P.2d 673, 678 (Okla. 1963), and *Grand River Dam Authority*, 201 P.2d at 227, both quoting *Wade v. Hope & Killingsworth*, 89 Okla. 64, 213 P. 549, 551 (1923).

The sole basis for the Court of Appeals' conclusion that Wilson's case was not a rate refund action within the exclusive jurisdiction of the Commission was that, as of that date, no increased payments as a result of the Contract had been made by ratepayers to OG&E. In February of 1991, however, OG&E began making payments to AES under the Contract and, in turn, began passing those costs onto its ratepayers. Not

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[6] All of the Directors' prior filings with this Court were *discretionary* writs. Wilson failed to recognize this distinction when he specifically declined to address the merits of the subject matter jurisdiction issue in his answer brief.

until then did Wilson begin paying the rates that he claims are excessive and a result of the Directors' wrongdoing. Because of this change of material facts, we hold that the October 6, 1990, opinion of the Court of Appeals does not constitute the "law of the case."

II.

WILSON'S COMMON LAW FIDUCIARY DUTY CLAIM

Wilson's claim is based upon the novel theory that, under Oklahoma common law, the Directors breached a duty of prudent managemnt to OG&E ratepayers, analogous to that owed its shareholders. It is well settled that directors of a corporation owe a fiduciary duty to the corporation and its stockholders under the common law. *See Pepper v. Litton,* 308 U.S. 295, 306, 60 S.Ct. 238, 245, 84 L.Ed. 281 (1939); *McKee v. Interstate Oil & Gas Co.*, 77 Okla. 260, 188 P. 109, 112 (1920). However, we hold that the common law of this state does not impose such a duty with respect to customers/ratepayers of a corporation.

The United States Court of Appeals for the Second Circuit addressed a similar situation in *County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52 (2d Cir. 1984). There, the County of Suffolk, on behalf of all ratepayers of a public utility, sued the utility and others for negligence, breach of contract and warranty, and misrepresentation and concealment relating to the design and construction of a nuclear power plant. Among other things, the court rejected the county's argument that the directors of a public utility owe a fiduciary duty to ratepayers:

> Nor can we adopt appellant's suggestion that LILCO's unique status as a monopolistic-public utility should give rise to a fiduciary responsibility, in accordance with which LILCO would have to act in the best interests of its customers, not just its shareholders. Such view poses numerous problems, not the least of which is that an artificial fiduciary relationship between LILCO and its ratepayers directly contravenes the fiduciary relationship LILCO already occupies with respect to its shareholders.

Id. at 63.

We find that *County of Suffolk* delineates the correct law regarding the issue raised herein. The appellees, as directors of a publicly held corporation, already owe a fiduciary duty to OG&E and its stockholders. As was true in *County of Suffolk*, any artificial relationship between OG&E and its ratepayers would directly contravene that existing fiduciary duty.

We acknowledge that *Hargrave v. Canadian Valley Elec. Co-op.*, 792 P.2d 50, 57 (Okla. 1990), recognized a fiduciary duty on the part of the trustees of a rural electric distribution cooperative ("REC") to its ratepayers. However, *Hargrave* is clearly distinguishable from the case at bar, which concerns a corporation rather than a cooperative. Unlike the ratepayers of OG&E, the ratepayers of an REC are its members and have statutorily authorized voting rights. 18 O.S. 1991 § 437.7. In the case of an REC, there is no one other than the ratepayers/members to whom the trustees can owe a fiduciary duty. Finally, the ratepayers/members of a cooperative occupy a position of ownership analogous to the ownership of a corporation by its stockholders. The ratepayers of OG&E do not occupy the position of ownership and control that is enjoyed by ratepayers/members of an REC. No fiduciary duty is owed OG&E ratepayers by the Directors.

III.

FEDERAL PREEMPTION

Even if this State did recognize the common law cause of action which Wilson presses in this case, we would find that such action is preempted by federal law. The preemption doctrine arises from the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI., c. 2, and "invalidates any state law that contradicts or interferes with an Act of Congress." *Missouri-Kansas-Texas Ry. Co. v. State*, 712 P.2d 40, 47 (Okla. 1985). A state law is invalid, *inter alia*, to the extent that it "actually conflicts with a . . . federal statute," *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978), or when it " 'stands as an obstacle to the accomplishment and execution of the full purpose of Congress.' " *Hillsborough County v. Automated*

Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1941). This Court has defined these two examples of preemption as where "an actual conflict between state and federal laws mak[es] it physically impossible to comply with both; or . . . where the objectives and purpose of Congress are thwarted by state law." *Todd v. Frank's Tong Service, Inc.*, 784 P.2d 47, 49 (Okla. 1989). The United States Supreme Court has "also recognized that 'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law." *City of New York v. F.C.C.*, 486 U.S. 57, 63-4, 108 S.Ct. 1637, 1642, 100 L.Ed.2d 48 (1988), quoting *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355, 369, 106 S.Ct. 1890, 1898-99, 90 L.Ed.2d 369 (1986).

PURPA was enacted to encourage utility companies to purchase energy from qualifying cogeneration and small power production facilities. As previously set forth, FERC rules require such purchases. *See* note 2. A cogenerator is entitled to receive for its electricity the utility's "full avoided cost."[7] 18 C.F.R. § 292.304(a)(1), (b)(2). A utility's full avoided cost is "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d). *See also* 18 C.F.R. § 292.101(b)(6). By setting the rate at full avoided cost, FERC recognized that a utility's ratepayers might not receive a direct economic benefit from the utilization of cogenerated energy. Rather, " 'ratepayers and the nation as a whole will benefit from the decreased reliance on scarce fossil fuels, such as oil and gas, and the more efficient use of energy.' " *American Paper Inst., Inc. v. American*

---

[7] Under certain circumstances, a state can set rates that are lower than full avoided costs. 18 C.F.R. § 292.304(b)(3). Also, a qualifying facility and a utility can negotiate for lower rates, § 292.301(b)(1), and a state regulatory authority or any non-regulated utility may apply to FERC for a waiver, § 292.403.

Elec. Power Serv. Corp., 461 U.S. 402, 406-7, 103 S.Ct. 1921, 1924-25, 76 L.Ed.2d 22 (1983), quoting 45 Fed. Reg. 12,222 (1980). *See also FERC v. Mississippi*, 456 U.S. 742, 746, 750, 756-758, 102 S. Ct. 2126, 2130, 2132, 2135-36, 72 L.Ed.2d 532 (1982).

FERC regulations also grant cogenerators the right to negotiate a long-term purchase contract with the price of the power to be purchased based on the avoided costs of the utility calculated at the time of delivery or at the time the obligation is incurred. 18 C.F.R. § 292.304(d). Should a cogenerator choose the latter method of calculation, it has the right to receive the benefits of the contract even if, due to changed circumstances, the contract price for the power at the time of delivery is unfavorable to the utility. 18 C.F.R. § 292.304(b)(5), (d)(2). FERC recognized that such regulations might result in a "purchasing utility . . . be[ing] required to pay a rate for purchases that would subsidize the [cogenerator] at the expense of the utility's other ratepayers." 45 Fed. Reg. 12,224 (1980). However, FERC concluded that this was appropriate in order "to ensure that a [cogenerator] which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances." *Id.*

On this basis, we hold that any common law fiduciary duty imposed upon the Directors which required them to rescind the Contract would directly conflict with PURPA and FERC regulations, thereby making it impossible to comply with both. The Directors could not comply with federal mandates to honor long term, fixed rate contracts with cogenerators, while at the same time being required to rescind any such contract which, due to changed circumstances, became undesirable to ratepayers. Imposing such a fiduciary duty would thwart the objectives and purpose of Congress. PURPA was enacted to encourage electric utilities to purchase energy from cogenerators. To hold the Directors to the duty proposed by Wilson, and subject them to civil penalties for a breach thereof, would certainly stand as an obstacle to the accomplishment and execution of the full purpose of Congress as expressed in PURPA and implemented by FERC regulations.

We do not hold that all state laws governing contracts between electric utilities and cogenerators are preempted by federal law. Our

holding is strictly limited to the claims, facts and regulations discussed herein. Accordingly, we conclude that Wilson's proposed cause of action is preempted by PURPA and FERC regultions.

IV.

RATE REFUND ACTIONS

The Directors also argue that the district court lacks subject matter jurisdiction of this action because it is simply another collateral attack upon prior Commission orders and constitutes an impermissible action for a rate refund. We agree. Although Wilson's petition is styled as negligence and/or intentional tort action and request for money damages, it is apparent that Wilson's goal is to recover for ratepayers the increased rate payments occasioned by the execution of the Contract. wilson's damage claim figure demonstrates his true intent. In his original Petition, Wilson prayed for $532,898,000 in damages. As Wilson assertd in his Petition, that figure is the exact amount of "[t]he costs of the AES contract to OG&E's customers and ratepayers as projected [and] publicly announced by OG&E . . ." After discovering that the foregoing figure represented only the costs associated with the first five years of the Contract, Wilson filed a Notice of Intent to Request Permission to Amend Petition, wherein he contends that the ultimate loss suffered over the 17-32 year life of the Contract will exced two billion dollars.

In *Continental Tel. Co. of Oklahoma v. Hunter*, 590 P.2d 667 (Okla. 1979), this Court confronted a situation analogous to the present case. The subscribers to telephone service sued the defendant telephone company in district court for breach of contract for interrupted service. The plaintiffs soght damages in an amount identical to the sum of refunds due for the service not given during the period involved. We characterized the subscribers' claim as an attack upon the adequacy of the service rendered and held that such a refund/reparation action was within the exclusive jurisdiction of the Commission. Particularly compelling is Justice Opala's specially concurring opinion, wherein he stated:

> [W]henever a tribunal is called upon to determine whether utility-rendered service has earned the full charges lawfully prescribed

> therefor, less than the fixed legal rate or nothing at all, the *issue presented requires an exercise of rate-making authority* which lies exclusively in the commission. As our Constitution clearly commands, the commission's exercise of rate-making authority may never be "questioned" anywhere else except on regular review prescribed by law.

Id. at 670 (Opala, J., concurring specially) (emphasis in original).

"The character of an action is determined by the nature of the issues made by the pleadings and the rights and remedies of the parties, and not alone by the form in which the action is brought or by the prayer for relief." *Comstock v. Little*, 359 P.2d 704, 709 (Okla. 1961), quoting *Green v. Correll*, 133 Okla. 94, 271 P. 241 (1928). After examining the nature of the issues raised in Wilson's petition, and the rights and the remedies of the parties involved, we conclude that Wilson's claim is in actuality an action for a refund of rates which he claims are excessive. Those rates were established by the Contract and approved by the Commission. As such, the Commission is vested with exclusive jurisdiction over this matter. Okla. Const. art. IX, § 18; 17 O.S. 1991 § et seq. The present suit constitutes an impermissible collateral attack upon the Commission's order approving the Contract.

CONCLUSION

We recognize no common law fiduciary duty on behalf of the Directors to the ratepayers of OG&E. Therefore, Wilson's petition fails to state a claim upon which relief can be granted. If such a duty did exist, it would be preempted by PURPA and FERC regulations. Furthermore, because this case is essentially a rate refund case, jurisdiction lies with the Commission and this case is an impermissible attack upon the Commission's order approving the Contract.

The order of the district court certifying this cause as a class action and authorizing maintenance as a class action is VACATED. This case is REMANDED to the district court with instructions to DISMISS for lack of subject matter jurisdiction.

HODGES, C.J., SIMMS, OPALA, SUMMERS, WATT, JJ., concur.
LAVENDER, V.C.J., WILSON, J., concur in result.
KAUGER, J., concurs in part, dissents in part.
HARGRAVE, J., dissents.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CHARLES D. "CHARLEY" WILSON,

Appellee,

vs.

JAMES G. HARLOW, JR., G.W. "BILL" SWISHER, JR., JOHN F. SNODGRASS, MARTHA W. GRIFFIN, JOHN A. TAYLOR, HERBERT N. CHAMPLIN, WILLIAM D. LITTLE, JR., F. DAIL HARPER and HUGH L. HEMBREE, III,

Appellants.

PETITION FOR REHEARING

The appellee, Wilson, petitions this court under Rule 28, Rules of the Supreme Court, to withdraw the opinion filed with the Clerk of this court on July 13, 1993. In support of this petition to withdraw the opinion, Wilson states:

(1) Wilson, the appellee, filed this lawsuit against the appellant Board of Directors seeking money damages for negligence. The district court dismissed the case on jurisdictional grounds. The Court of Appeals reversed and held there was no problem with jurisdiction. All jurisdictional issues were presented to this court on certiorari. This court denied certiorari. The parties returned to the trial court where all jurisdictional questions were presented once again, including a new one concerning PURPA. The trial court held for Wilson on all issues. The Board of Directors then prevailed on the trial court to grant an interlocutory appeal and certify all questions up to this court for review. This court denied certiorari on these certified questions. The Board of Directors then sought a Writ of Prohibition against the trial court on the identical jurisdictional issues. The application for a writ was denied by this court.

(2) The parties then returned to the trial court. Wilson asked for and the trial court ordered that the case proceed as a class action. The Board of Directors then instituted an interlocutory appeal on the class action certification order. This case is presently before this court on the interlocutory appeal from that order.

(3) At this point it is necessary to present facts to this court in support of this petition to withdraw the opinion that appear nowhere in the opinion under consideration.

(4) On August 11, 1992, the appellant Board of Directors filed their petition in error in this interlocutory appeal from the class action order. The petition in error disclosed the appellants intended to once again raise the previously decided issues going to the jurisdiction of the trial court to entertain this case. On the same day appellants filed a motion seeking permission to file a 50 page brief in support of their petition in error.

(5) On August 14, 1992, Wilson filed a response to both the petition in error and the motion to enlarge brief. In each response Wilson pointed out that much of what appellants proposed to bring to this court in this interlocutory appeal (the jurisdictional questions) had long since been presented and passed on by this court several times. In view of the court's subsequent order concerning the length of the brief in chief of appellants of particular note is the last paragraph of Wilson's response to the motion to enlarge brief and we quote:

> "The appellants may need more than a 30 page brief to say whatever they have to say about the class action certification issue in this appeal. However, the court should inform appellants that their brief should be limited to the question of class action certification and that the court has no need or desire to plow the same ground over on issues already decided adversely to the appellants."

(6) On August 18, 1992, this court directed the clerk to issue the following order:

> 80,097 Charles D. "Charley" Wilson v James G. Harlow, Jr. et al
>
> On written application and agreement of the parties, appellants are granted leave t (sic) file by August 31, 1992, brief in chief of 50 pages

in length. Brief is to be carefully limited to issues before the court in this appeal. Appellee is granted leave to file his answer brief of comparable length.

s/s Marion P. Opala

CHIEF JUSTICE

(7) Notwithstanding this specially tailored order from this court as to the content of their brief, the Board of Directors proceeded to file a 50 page brief, only 7 of which was directed to the class action issues in this appeal and the other 43 pages going to the jurisdictional questions.

(8) In conjunction with his answer brief, Wilson filed a motion to strike appellants' brief for a willful violation of the court's order of August 18, 1992. Wilson took the position in his answer brief that the court's order precluded any briefing on the jurisdictional issues. Wilson maintained in his answer brief that a detached study of the order in the context within which it was issued could reach no other conclusion. The use of the word "limited" in both the response and the order was significant. The use of the word "carefully" in the order was even more so. Further, Wilson maintained, if the court by the order did not intend to limit the briefs to the issues going to the class certification, then why insert the cautionary language in the first place.

(9) In any event Wilson obeyed this court's order and did not brief the jurisdictional questions in his answer brief. In his brief, Wilson assigned the limitations placed on the briefs by the August 18, 1992, order as his number one reason for not briefing these questions.

(10) Thus the matter stood on briefs before this court. The only communication Wilson received from the court during the 11 months the appeal was before this court was dated October 16, 1992, and informed the parties that the Supreme Court was going to retain the case and not assign it out to a Court of Appeals. Wilson received no notice or communication whatever that the court was *even considering* modifying its order of August 18, 1992, relative to the briefing of the jurisdictional issues. Wilson of course does not know when this court changed its mind and decided to examine once again the jurisdictional questions, but Wilson does know that he was not *requested or directed or offered an*

opportunity to brief and respond to those questions.

(11) On July 13, 1993, this court promulgated and issued the opinion herein. Wilson's motion to strike appellants' brief was ignored and has not yet been ruled upon. The opinion clearly discloses the court adopted virtually in toto the brief and argument of the Board of Directors on the jurisdictional questions in all respects.

WILSON'S CONTENTIONS

(1) After specifically ordering that such issues not be briefed, the adoption by this court of the argument and brief of the Board of Directors on the jurisdictional issues, without notice to Wilson or offering Wilson an opportunity to respond and present his position on such issues plainly deprived Wilson of procedural Due Process of Law under the Fourteenth Amendment to the Constitution of the United States.

(2) In effect, Wilson and his class of ratepayers were trapped and blind-sided through this opinion by being deprived of notice and an opportunity to be heard. The disastrous result to Wilson and the class because of lack of notice and an opportunity to be heard is underscored when there is taken into account the three previous occasions (only two in the instance of PURPA) when these identical questions in identical language were presented to this court while the court had the benefits of Wilson's argument and briefs on the questions and Wilson prevailed each and every time.

Wherefore, Wilson requests that the following steps be taken by the court:

(1) That the opinion of July 13, 1993, be withdrawn and rendered of no effect and void on the grounds that Wilson was deprived of Due Process of Law under the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the United States has held that under such circumstances the "slate must be wiped clean" and a new start take place.

(2) That once this opinion is withdrawn and the slate rendered absolutely clean then this court should enter its order permitting Wilson a reasonable time to file his brief on the jurisdictional issues.

RESPECTFULLY SUBMITTED,
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ATTORNEYS FOR APPELLEE

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, October 5, 1993

THE CLERK IS DIRECTED TO ISSUE
THE FOLLOWING ORDERS:

80,097
Charles D. "Charley" Wilson v.
James G. Harlow, Jr., G.W. Swisher, Jr.,
John F. Snodgrass et al.

Rehearing denied.

CONCUR: Hodges, C.J., Lavender, V.C.J., Simms, Opala, Wilson, Kauger, Watt, JJ.
DISSENT: Hargrave, Summers, JJ.

(s) Ralph B. Hodges
CHIEF JUSTICE

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 80097

August 14, 1992

CHARLES D. "CHARLEY" WILSON

Appellee

vs

JAMES G. HARLOW, JR., et al

Appellants

RESPONSE TO APPELLANTS' MOTION TO ENLARGE BRIEF

What is involved herein is an interlocutory appeal as a matter of right under Title 12 OS)(993 A.6 from the trial court's order certifying this case as a proper one for a class action.

A few days after this order was entered, in a phone conversation with the attorney for appellee, appellants stated that they did intend to appeal the class certification order and inquired if appellee had any objection to appellants seeking permission to enlarge their brief. The attorney for the appellee told them such was no problem for him and that they could have some of his pages because he did not need any 30 pages on the class action certification point.

Following this appellants filed their designation of record calling for material going only to the class action certification question. This was filed July 31, 1992. The appellee filed short counter designations. The clerk of the court sent out Notice of Completion of Record for appeal on August 5, 1992.

At some point in all this the appellants apparently decided to convert a simple statutory permitted interlocutory appeal on one issue into a complete review once again by this court of all substantive issues this court has considered before in this case. On August 10, 1992, the appellants filed with the clerk of the trial court an amendment to their designation of record calling for placing in the record on appeal various motions and orders all going to questions previously decided by this court adversely to appellants. In their petition in error they once again raise these issues.

As appellee has pointed out in his response to the petition in error, the jurisdiction question was settled by the opinion of the Court of Appeals with certiorari denied in No. 72951. It was raised again in a previous interlocutory appeal and settled once again adversely to appellants in No. 78917. And again, with the same result, in No. 79192. The federal preemption and Filed Rate Doctrine issue was resolved against the appellants in No. 78917 and again in No. 79192. Whether the Court of Appeals opinion is the "law of the case" was settled in No. 78917 and No. 79192.

The legislature, in enacting Title 12 OS)(993.6 intended to confer jurisdiction on this court to hear an interlocutory appeal on a specified point, i.e., the class action certification order of the trial court. The legislature did not intend that the section be utilized for what the appellants are attempting to do here.

The appellants may need more than a 30 page brief to say whatever they have to say about the class action certification issue on this appeal. However, the court should inform the appellants that their brief should be limited to the question of the class action certification and that the court has no need or desire to plow the same ground over on issues already decided adversely to the appellants.

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ATTORNEYS FOR THE APPELLEE

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, August 18, 1992

THE CLERK IS DIRECTED TO ISSUE
THE FOLLOWING ORDERS:

80,097
Charles D. "Charley" Wilson v. James G. Harlow, Jr. et al. On written application and agreement of parties, appellants are granted leave t file by **August 31, 1992** brief in chief of 50 pages in length. Brief is to be carefully limited to issues before court in this appeal. Appellee is granted leave to file his answer brief of comparable length.

(s) Marion P. Opala
CHIEF JUSTICE

APPENDIX F

No. 80097

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CHARLES D. "CHARLEY" WILSON
Appellee
vs
JAMES G. HARLOW, JR., G.W. "BILL" SWISHER, JR., JOHN F. SNODGRASS, MARTHA W. GRIFFIN, JOHN A. TAYLOR, HERBERT N. CHAMPLIN, WILLIAM D. LITTLE, JR., F. DAIL HARPER, and, HUGH L. HEMBREE III
Appellants

APPEAL FROM THE DISTRICT COURT OF
MUSKOGEE COUNTY
STATE OF OKLAHOMA

THE HONORABLE JAMES E. EDMONDSON, JUDGE

APPEAL FROM CLASS ACTION CERTIFICATION ORDER

ANSWER BRIEF OF APPELLEE

MOTION TO STRIKE APPELLANTS' BRIEF

Appellee moves the court to strike appellants' brief in chief and affirm the order of the trial court on the grounds that the brief is in direct violation of a carefully tailored order of this court which order was over the signature of the Chief Justice of this court. The court directed that appellants' brief be "carefully limited to issues before the court in this appeal." In flagrant disregard of this direct order, the appellants have filed a brief of 50 pages only 7 of which are devoted to the issues before the court in this appeal. Under the "persuasive" authority of *Matter of Estate*

of Ray, 804 P2nd 458 (Okl. App. 1990) appellants' brief should be stricken.

ARGUMENT ON STRIKING BRIEF

(Omitted from this Appendix)

PROPOSITION I

APPELLANTS' ARGUMENT IN THEIR BRIEF UNDER THEIR FIRST PROPOSITION TO THE EFFECT THE DISTRICT COURT HAS NO SUBJECT MATTER JURISDICTION OVER APPELLEE'S ACTION SHOULD NOT AND WILL NOT BE RESPONDED TO BY THE APPELLEE IN THIS BRIEF

The appellants in their brief, from pages 9 through 32, once again for multiple times, are asking this court to plow old fields one more time. Once again they urge this court to consider the federal preemption issue, the duty of care owed by a public utility's board of directors to its ratepayers issue, the collateral attack on a Commission order issue, and the rate refund issue all of which they claim deprives the district court jurisdiction to hear this lawsuit.

Appellee does not intend to fall into appellants' trap and respond once again to all these previously briefed, argued, and passed on issues. Appellee takes this position for four valid reasons. They are:

1. This court in its order of August 18, 1992, directed the briefing be "carefully limited" to the issues before the court in this appeal.

2. This court does not have cognizance over such issues in this interlocutory appeal.

3. The issues have all been previously briefed, argued, and considered by this court multiple times and appellants have been rebuffed by this court on each occasion.

4. All such issues were presented, or could have been presented, in the first appeal in this case. The opinion of the Court of Appeals decided

the issues against the appellants. This court denied certiorari. The opinion of the Court of Appeals is the law of the case.

(Further material from answer brief omitted from this Appendix)

Supreme Court, U.S.
FILED
JAN 27 1994
OFFICE OF THE CLERK

No. 93-1046

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CHARLES D. "CHARLEY" WILSON,

Petitioner,

v.

JAMES G. HARLOW, JR., G.W. "BILL" SWISHER, JR., JOHN F. SNODGRASS, MARTHA W. GRIFFIN, JOHN A. TAYLOR, HERBERT H. CHAMPLIN, WILLIAM D. LITTLE, JR., F. DAIL HARPER, and HUGH L. HEMBREE, III,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Attorneys For Respondents

January 28, 1994

QUESTIONS PRESENTED

1. Was there any violation of petitioner's due process rights where, after petitioner had ample opportunity to address the issue of subject matter jurisdiction, the Supreme Court of Oklahoma dismissed petitioner's lawsuit on the grounds that: (1) petitioner failed to state a cause of action under Oklahoma law; (2) Oklahoma law precluded jurisdiction in the trial court because the case was an action for rate refund within the exclusive jurisdiction of the Oklahoma Corporation Commission and constituted an impermissible collateral attack on a Commission order; and (3) petitioner's state law claims, to the extent that any could be stated, would be preempted by a federal statutory scheme?

2. Does this Court have subject matter jurisdiction over petitioner's lawsuit given that the Supreme Court of Oklahoma's opinion dismissing petitioner's lawsuit is based on two separate adequate and independent state law grounds?

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No. 93-1046

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHARLES D. "CHARLEY" WILSON,

Petitioner,

v.

JAMES G. HARLOW, JR., G.W. "BILL" SWISHER, JR., JOHN F. SNODGRASS, MARTHA W. GRIFFIN, JOHN A. TAYLOR, HERBERT H. CHAMPLIN, WILLIAM D. LITTLE, JR., F. DAIL HARPER, and HUGH L. HEMBREE, III,

Respondents.

Petition For A Writ Of Certiorari To The
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BRIEF FOR THE RESPONDENTS IN OPPOSITION

REASONS FOR DENYING THE WRIT

The Supreme Court of Oklahoma dismissed Petitioner Charles D. "Charley" Wilson's ("Wilson") lawsuit against the Respondents on two separate state law grounds and because, even if a claim such as Wilson's could be stated under Oklahoma law, it would be preempted by federal law. In his petition for a writ of certiorari in this Court ("Petition"), Wilson argues that, despite dispositive authority requiring the Supreme Court of Oklahoma to address subject matter jurisdiction issues,

and Wilson's ample opportunity to brief those issues, he was denied due process by the Supreme Court of Oklahoma because he chose not to address the issue of subject matter jurisdiction in his briefs to that court. Wilson's argument is completely without merit.

STATEMENT OF THE CASE

In 1985, Oklahoma Gas and Electric Company ("OG&E"), a publicly-held utility, entered into an Amended Power Sales Agreement (the "Contract") with AES Shady Point, Inc. ("AES"). The Contract required OG&E to buy electricity generated by a qualifying cogeneration facility to be built by AES in Oklahoma, as mandated by the Public Utility Regulatory Policies Act of 1978) ("PURPA"), 16 U.S.C. §824a-3 *et seq.* (1988).[1] Respondents were all members of the Board of Directors of OG&E at the time the Contract was executed. (Respondents are hereinafter referred to as "the Directors".)

The Contract

The Contract was submitted to the Oklahoma Corporation Commission ("Oklahoma Commission") for approval, in accordance with PURPA and the rules promulgated by the Oklahoma Commission.[2] After

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1 PURPA is a federal statutory scheme "designed to encourage the development of cogeneration and small power production facilities." *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402, 404 (1983).

2 PURPA and its implementing regulations require state regulatory authorities to implement the federal PURPA legislation. *See* 16 U.S.C. 824a-3(f) (1) (1988); 18 C.F.R. §292.401(a). The State of Oklahoma, in compliance

notice, a Hearing Officer of the Oklahoma Commission conducted a hearing on September 20, 1985. Wilson did not appear at the hearing. The Hearing Officer issued a report on January 8, 1986, recommending that the Contract be approved. (R. App. A.)[3]

On February 27, 1986, the Oklahoma Commission adopted the report of the Hearing Officer in its entirety and approved the Contract in Order No. 293731. In its order, the Oklahoma Commission found, *inter alia*, that the rates set forth in the Contract "are fair, just and reasonable, are in the best interests of the ratepayers, and are not discriminatory against either AES or OG&E." (R. App. B at 2.) As approved, the rates paid to AES by OG&E pursuant to the Contract are passed on to OG&E's Oklahoma retail customers.

Wilson's Lawsuit Against The Directors

On December 19, 1988, almost three years after the Oklahoma Commission approved the Contract, Wilson

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with the federal mandate, has designated the Oklahoma Commission as the state regulatory agency responsible for implementing and enforcing PURPA. Okla. Stat.Ann. tit. 17, §34.1 (Supp. 1994).

[3] Because the appendix to Wilson's Petition does not include a number of orders and opinions required under this Court's Rule 14.1(k)(ii), the Directors, pursuant to Rule 24.2, are including a supplemental appendix to their brief in opposition containing the appropriate additional orders and opinions. References in this brief to the Directors' supplemental appendix are cited as "R. App.", and references to Wilson's appendix are cited as "P. App.", followed by the relevant page number of the respondents' or petitioner's appendix.

brought this action against the Directors. In this action, Wilson challenges the Contract required by federal law and approved by the Oklahoma Commission as violative of Oklahoma common law, and claims to represent a class consisting of all Oklahoma ratepayers of OG&E.[4]

Wilson's lawsuit is premised on the novel theory that the Directors owed a duty of prudent management under Oklahoma law to OG&E's ratepayers in Oklahoma, akin to the fiduciary duty owed by the Directors to OG&E's shareholders. Wilson claims that the Directors breached this alleged duty in various ways. In particular, Wilson

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[4] Wilson filed two other actions arising out of the same Contract and raising similar issues. In each of those actions, every issue has been decided against Wilson.

On May 1, 1990, Wilson sued OG&E and AES in a separate action in the District Court of LeFlore County, Oklahoma (No. C-90-185), seeking to enjoin OG&E and AES from performing under the Contract. On August 14, 1991, the LeFlore County District Court found against Wilson and in favor of OG&E on every issue and dismissed Wilson's lawsuit. Wilson appealed the LeFlore County District Court's order, and the Oklahoma Court of Appeals affirmed. *Wilson v. Oklahoma Gas & Electric*, No. 78,230 (Okla. Ct. App. Nov. 24, 1992) (unpublished opinion). On March 17, 1993, the Supreme Court of Oklahoma denied Wilson's petition for certiorari.

On March 4, 1991, Wilson commenced a proceeding before the Oklahoma Commission (No. PUD 001054) seeking to vacate the Oklahoma Commission's Order No. 293731, by which the Oklahoma Commission approved the Contract. The Oklahoma Commission dismissed Wilson's application with prejudice. Wilson appealed the dismissal to the Oklahoma Court of Appeals (No. 77,762), which affirmed the Oklahoma Commission's dismissal. *Wilson v. Corporation Commission*, No. 77,761 (Okla. Ct. App. Nov. 10, 1992) (unpublished opinion). In that case, Wilson did not file a petition for certiorari to the Oklahoma Supreme Court.

complains of the Directors' failure to repudiate the Contract after it was executed and approved by the Oklahoma Commission when the Directors allegedly learned of new circumstances making the Contract less favorable to OG&E and its ratepayers. Wilson alleges that these "breaches" by the Directors of their alleged duty to ratepayers will result in excessive rates to OG&E's ratepayers under the Contract. Wilson seeks a money judgment against the Directors in excess of two billion dollars, which he claims is the amount that OG&E ratepayers will pay in excessive rates as a result of the challenged Contract.

Procedural History

On March 21, 1989, the trial court granted the Directors' motion to dismiss this lawsuit for lack of subject matter jurisdiction on the ground that Wilson's claims were exclusively within the jurisdiction of the Oklahoma Commission. (R. App. C.) On November 6, 1990, the Oklahoma Court of Appeals, Tulsa Division, reversed the trial court's dismissal, holding, *inter alia*, that the case was not ripe for decision because payments had not yet been made by OG&E to AES under the Contract and there had therefore been no concomitant rate increase to ratepayers which could be the subject of Oklahoma Commission action. (R. App.D.) On March 5, 1991, the Supreme Court of Oklahoma denied certiorari to review the Court of Appeals' decision. (R. App. E.)

In February 1991, after the Oklahoma Court of Appeals' decision, OG&E began making payments to AES under the Contract, and OG&E ratepayers began paying increased rates reflecting those payments. Thereafter, on

remand to the trial court following the Supreme Court of Oklahoma's denial of certiorari, the Directors again moved to dismiss this lawsuit for lack of subject matter jurisdiction. By this time, payments had been made by OG&E to AES under the Contract; the absence of such payments had been the basis for the Court of Appeals' decision to hold the issue of subject matter jurisdiction in abeyance. (P. App. A at 8a.) However, the trial court denied the Directors' renewed motion without opinion on October 4 and 17, 1991. (R. App. F and G.)

On November 18, 1991, the Directors moved to dismiss for lack of subject matter jurisdiction on the ground that PURPA preempted Wilson's state law claims. On December 16, 1991, the trial court denied the Directors' motion without opinion. (R. App. H.)

On December 23, 1991, the trial court certified its orders of October 4 and 17, 1991 and December 16, 1991 for interlocutory appeal pursuant to Okla. Stat. Ann. tit. 12, §952(b)(3) (Supp. 1994). (R. App. I.) Thereafter, the Directors filed their petition for certiorari in the Supreme Court of Oklahoma seeking review of the district court's orders of October 4 and 17, and December 16, 1991 (No. 78,917). The Directors also filed in the Supreme Court of Oklahoma a separate application to assume original jurisdiction (No. 79,192). On June 11, 1992, the Supreme Court of Oklahoma denied the Directors' petition for certiorari and their application to assume original jurisdiction without opinion. (R. App. J.)[5]

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[5] In his Petition, Wilson makes a series of statements implying that the Supreme Court of Oklahoma had previously decided the same jurisdictional issues on which that court finally dismissed Wilson's case. For example,

The Directors' Appeal In The Oklahoma Supreme Court

On July 13, 1992, the trial court certified a plaintiff class consisting of all 620,000 Oklahoma ratepayers of OG&E. (R. App. K.) The Directors appealed the trial court's class certification order. In contrast to the Directors' three previous attempts to obtain the Supreme Court of Oklahoma's review of the subject matter jurisdiction issues by petitions for certiorari and an application to assume

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Wilson's Petition states that: (i) "[o]n three separate occasions the jurisdictional questions were presented to the Supreme Court of Oklahoma . . . and on each occasion [Wilson] prevailed" (Petition at 2); (ii) "The Papers affecting [sic] the appeal disclosed that respondents intended to raise previously decided issues going to the jurisdiction of the trial court to entertain the case" (Petition at 3); (iii) "Petitioner pointed out in his response that much of what respondents intended to bring to the court in the interlocutory appeal had long since been presented to and passed on by the court many times" (Petition at 3); and (iv) "In the three previous occasions when the identical issues had been presented in the identical language and briefed by both sides (save for PURPA which had only been up two times), petitioner had prevailed each time by a substantial majority vote of the court." (Petition at 6, 7).

Wilson's implication that the Supreme Court of Oklahoma had previously decided the jurisdictional issues is false. What the Supreme Court of Oklahoma did three times prior to first deciding the subject matter jurisdiction issue on July 13, 1993, was decline to exercise its discretionary jurisdiction to decide the subject matter jurisdiction issue. That court did so twice by denying the Directors' petitions for certiorari (once on March 5, 1991 (R. App. E) and once on June 11, 1992) (R. App. J), and once by denying the Directors' application to assume original jurisdiction on June 11, 1992. (R. App. J.) The Supreme Court of Oklahoma addressed the subject matter jurisdiction issue for the first time in its July 13, 1993 opinion. (P. App. A at n. 6)

original jurisdiction, the Directors' appeal of the trial court's class certification order was taken as of right, pursuant to Okla. Stat. Ann. tit. 12, §993(A)(6) (1988).

With their notice of appeal to the Supreme Court of Oklahoma, the Directors filed a motion for permission to enlarge their brief beyond the usual 30 page limit and to file a brief of up to 50 pages. In their notice of appeal and in their motion, the Directors stated that they intended to challenge the subject matter jurisdiction of the trial court to hear the case. Wilson responded to the Directors' motion to enlarge the page limit for their brief, acknowledging that he was aware and understood that the Directors intended to address the subject matter jurisdiction issues and seeking to limit the Directors' brief "to the question of the class action certification." (P. App. D at 23a.) On August 18, 1992, the Chief Justice of the Supreme Court of Oklahoma directed the clerk to enter the following order:

> On written application and agreement of parties, appellants are granted leave t[sic] file by August 31, 1992 brief in chief of 50 pages in length. Brief is to be carefully limited to issues before court in this appeal. Appellee is granted leave to file his answer brief of comparable length.

(P. App. E.)

In their initial brief in the appeal to the Supreme Court of Oklahoma from the class certification order, the Directors noted that subject matter jurisdiction issues may be raised at any time, and devoted a significant portion of

their brief (pages 9 through 33) to the reasons why the trial court lacked subject matter jurisdiction over Wilson's lawsuit. In his answering brief, Wilson responded to the Directors' subject matter jurisdiction arguments by declaring that he "does not intend to fall into [the Directors'] trap and respond once again to all these previously briefed, argued, and passed on issues." (P. App. F.) Thus, Wilson expressly chose not to respond to arguments properly raised and briefed by the Directors.

On July 13, 1993, the Supreme Court of Oklahoma issued an opinion vacating the trial court's class certification order and dismissing Wilson's lawsuit for lack of subject matter jurisdiction. The court held that: (1) under Oklahoma law, the Directors did not owe a fiduciary duty to OG&E's ratepayers such as that claimed by Wilson, and that Wilson's suit therefore failed to state a cause of action under Oklahoma law (P. App. A at 9a-10a); (2) even if Oklahoma common law did recognize the cause of action asserted by Wilson, the court "would find" that Wilson's action is preempted by PURPA (P. App. A at 10a-13a); and (3) the trial court lacked subject matter jurisdiction over Wilson's lawsuit because his lawsuit is an action for a rate refund over which the Oklahoma Commission has exclusive jurisdiction under Oklahoma law and Wilson's lawsuit constitutes an impermissible collateral attack on the Oklahoma Commission's order approving the Contract. (P. App. A at 13a-14a.) Thus, the Oklahoma Supreme Court's dismissal of Wilson's lawsuit is based on two separate state law grounds and on an issue involving federal law. In its opinion, the Supreme Court of Oklahoma noted that Wilson had voluntarily chosen not to respond to the Directors' subject matter jurisdiction

arguments. (P. App. A at 8a, n. 6.) The Supreme Court of Oklahoma expressly rejected Wilson's argument that that court should not address the issue of subject matter jurisdiction in the Directors' appeal, pointing out that under Oklahoma law "this Court has a duty to inquire into the jurisdiction of the trial court, even in the absence of a request by one of the parties." (P. App. A at 7a.)

On July 28, 1993, Wilson filed a petition for rehearing with the Supreme Court of Oklahoma (P. App. B). In his petition for rehearing, Wilson did not challenge any of the three grounds stated by that court in its opinion dismissing his lawsuit. Instead, Wilson argued that the Supreme Court of Oklahoma deprived him of his procedural due process right to notice and an opportunity to be heard by deciding the subject matter jurisdiction issues that Wilson had chosen not to brief. (P. App. B at 19a.) The basis for Wilson's theory in this regard was the August 18, 1992 order issued by the Supreme Court of Oklahoma, directing that the parties' briefs "be carefully limited t(sic) issues before the court in this appeal." Oklahoma law is absolutely clear that, because the issue of subject matter jurisdiction is of fundamental importance in any lawsuit, it is always an issue before a court and may be raised at any time by the parties or by the court *sua sponte*. Consequently, on October 5, 1993, the Supreme Court of Oklahoma denied Wilson's petition for rehearing. (P. App. C.)

Wilson now seeks this Court's review by writ of certiorari of the Supreme Court of Oklahoma's decision dismissing his lawsuit for lack of subject matter jurisdiction.

SUMMARY OF ARGUMENT

Wilson was not denied due process when the Supreme Court of Oklahoma dismissed his lawsuit for lack of subject matter jurisdiction after Wilson expressly refused to brief the jurisdictional issues notwithstanding the Directors' extensive briefing of those issues and clear, controlling Oklahoma law requiring the Supreme Court of Oklahoma to address subject matter jurisdiction issues at any time. Furthermore, this Court does not have jurisdiction over Wilson's lawsuit and Petition because the Supreme Court of Oklahoma's decision is based on two separate adequate and independent state grounds. Even assuming *arguendo* that this Court did have jurisdiction over Wilson's lawsuit and Petition, there are no "special and important reasons" warranting this Court's exercise of its discretion to grant Wilson's Petition.

ARGUMENT

I.

WILSON WAS NOT DENIED DUE PROCESS.

Wilson's Petition is based entirely on the argument that the Supreme Court of Oklahoma deprived him of his procedural due process rights when he chose not to brief the jurisdictional issues and that court dismissed his lawsuit for lack of subject matter jurisdiction. This argument is totally without merit and cannot withstand even cursory analysis.

As the Supreme Court of Oklahoma stated in its opinion, the issue of a court's subject matter jurisdiction "'is of primary and fundamental importance and *may be raised at any time,*'" quoting *Board of County Commissioners v. City of Norman*, 472 P. 2d 910, 913 (Okla. 1970) (emphasis in original). (P. App. A at 7a.) Indeed, the Oklahoma legislature has specifically directed that:

> *Whenever* it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court *shall* dismiss the action.

Okla. Stat. Ann. tit. 12, §2012(F)(3)(1993) (emphasis supplied). As the Supreme Court of Oklahoma pointed out in its opinion, based upon well-established law, "this Court has a duty to inquire into the jurisdiction of the trial court, even in the absence of a request by one of the parties," *citing Dickson v. Dickson*, 637 P. 2d 110, 112 n.2 (Okla. 1981). (P. App. A at 7a.) Indeed, the Supreme Court of Oklahoma has considered and ruled upon the question of subject matter jurisdiction even where the parties have neither raised nor briefed the issue. *See, e.g., Hawkins v. Hurst*, 467 P. 2d 159, 162 (Okla. 1970). Wilson does not dispute these clear statements of the "internal procedures" of the Oklahoma courts. On the contrary, Wilson acknowledged in his brief in support of petition for rehearing, at page 4, that "[i]t is true, of course, that any court can, on its own initiative, raise the question of jurisdiction at any time."[6]

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[6] Wilson's appendix to his Petition to this Court includes a copy of Wilson's petition for rehearing, but does not include his brief in support.

Despite this overwhelming authority, which even Wilson has acknowledged, for purposes of his answer brief in the Supreme Court of Oklahoma, Wilson decided that the Directors' "Argument . . . To The Effect The District Court Has No Subject Matter Jurisdiction Over [This] Action Should Not And Will Not Be Responded To By [Wilson] In This Brief." (P. App. F at 27a.) This was Wilson's choice, no one else's.

Throughout his Petition, Wilson states or implies that the Oklahoma Supreme Court's order of August 18, 1992 precluded him from briefing jurisdictional issues.[7] This is simply false. As shown above, the Supreme Court's order of August 18, 1992 directed the parties to limit their briefs to issues before the court. (*See* P. App. E.) Oklahoma law was (and still is) clear that subject matter jurisdiction is always an issue before a court. Thus, Wilson's argument is that, despite dispositive authority requiring the Supreme Court of Oklahoma to address subject matter jurisdiction issues and Wilson's ability, if he so chose, to brief those issues, he was denied due process because he chose not to do so. This argument is absurd. Due process is not denied when a court decides a case

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7 For example, at page (i) of his Petition, Wilson states: "In an interlocutory appeal from a class certification order, the Supreme Court of Oklahoma by order directed that briefs be limited to the issues presented by the class certification order." Similarly, in footnote 1 on page 3 of his Petition, Wilson states: "No place does the opinion mention that the number one reason petitioner had failed to 'address' the merits of the subject matter jurisdiction was because the court had ordered such not be done in its August 18, 1992 order."

based on issues properly before it simply because a litigant declines to brief all of the issues.

Furthermore, in his July 28, 1993 petition for rehearing to the Supreme Court of Oklahoma (P. App. B), Wilson could have challenged the Supreme Court of Oklahoma's basis for dismissing his lawsuit.[8] Yet, again, he chose not to do so. Instead, he utilized his petition for rehearing to try to characterize his lawsuit as a "procedural default" case, presumably to bring his lawsuit and Petition within this Court's jurisdiction. (P. App. B at 19a.) Obviously, this attempt should fail.

II.

THE OKLAHOMA SUPREME COURT'S DECISION DISMISSING WILSON'S LAWSUIT IS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

As shown above, Wilson was not denied due process by the Supreme Court of Oklahoma, and that court's decision dismissing Wilson's lawsuit is based on two independent and adequate state grounds. It necessarily follows that this Court lacks jurisdiction over Wilson's lawsuit.

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8 Oklahoma law is clear that a litigant may assert an argument for the first time in a petition for rehearing if the court's subject matter jurisdiction is involved. *See, e.g., Pointer v. Hill*, 536 P.2d 358, 361 (Okla. 1975).

The applicable provision governing this Court's jurisdiction over a final judgment entered by a state high court is 28 U.S.C. §1257(a) (1988), which provides in pertinent part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States.

Although the language of §1257(a) appears to indicate that this Court may review *any* judgment rendered by a state high court in which a federal issue is involved, that is not the case where state law issues are also involved. This Court has long recognized that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [the Court's] jurisdiction fails if the non-federal ground is *independent* of the federal ground and *adequate* to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (emphasis added). This so-called adequate and independent state grounds doctrine "is based, in part, on 'the limitations of [the Court's] own jurisdiction.'" *Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (*quoting Herb v. Pitcairn*, 324 U.S. 117, 125 (1945), *overruled on other grounds by Michigan v. Long*). As this Court explained in *Long*: "The jurisdictional concern is that we not 'render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory

opinion.'" *Id.* (*quoting Herb v. Pitcairn,* 324 U.S. at 126). *See also Coleman v. Thompson,* 111 S. Ct. 2546, 2553 - 54 (1991).

In this case, the Supreme Court of Oklahoma did decide a question of federal law, namely, that Wilson's alleged claims against the Directors are preempted by PURPA. (P. App. A at 10a-13a.) However, this question of federal law is not presented for review in Wilson's Petition. Furthermore, the Oklahoma Supreme Court's judgment dismissing Wilson's lawsuit is also based on two separate state law grounds. First, Oklahoma does not recognize that the Directors of OG&E have a common law fiduciary duty to the ratepayers of OG&E, as Wilson postulates in his lawsuit, and therefore Wilson's lawsuit fails to state a claim under Oklahoma law. Second, the Oklahoma courts lack subject matter jurisdiction over Wilson's claim because it is an action for a rate refund within the exclusive jurisdiction of the Oklahoma Commission and an impermissible collateral attack on the prior Oklahoma Commission orders approving the Contract. Clearly, either of these rulings on Oklahoma law is both independent and adequate to support the judgment of the Supreme Court of Oklahoma. Thus, assuming, *arguendo*, that the Supreme Court of Oklahoma was wrong in its decision that Wilson's claims against the Directors are preempted by PURPA, this Court's correction of that error would not change the judgment entered by the Supreme Court of Oklahoma. Judgment would still be entered in favor of the Directors and Wilson's lawsuit would still be dismissed--only for two separate state law reasons, instead of for two separate state law reasons and a federal law reason.

This Court lacks jurisdiction over Wilson's lawsuit because the Supreme Court of Oklahoma's decision is based on state law grounds that are adequate and independent of that court's resolution of the federal preemption issue. Accordingly, this Court should deny Wilson's Petition.

III.

THERE IS NO "SPECIAL AND IMPORTANT" REASON TO GRANT WILSON'S PETITION.

Even assuming *arguendo* that this Court has jurisdiction over Wilson's lawsuit, this Court should exercise its discretion to deny Wilson's Petition. This Court's Rule 10 provides that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Rule 10 then identifies two types of reasons that satisfy this stringent requirement in the context of a state high court decision: (1) "when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals"; and (2) "when a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." United States Supreme Court Rule 10.1(b),(c). The Supreme Court of Oklahoma's decision in this case falls into neither of these categories.

Wilson does not argue that the Supreme Court of Oklahoma's decision on the federal question of PURPA preemption conflicts with the decision of another state court of last resort or a federal appeals court, and the Directors are unaware of any such cases.

Wilson does conclusorily assert that the Supreme Court of Oklahoma's "internal procedure[s]" "conflict[ ] with the applicable decisions" of this Court. (Petition at 5.) However, Wilson does not identify any "applicable decisions" of this Court with which the Oklahoma Supreme Court's decision to resolve an issue that is always properly before any court allegedly conflicts. Again, the Directors are aware of no such cases.

Although the above-quoted "special and important reasons" guiding this Court's exercise of its discretion to grant a writ of certiorari is illustrative rather than exhaustive, the Directors respectfully submit that there is no imaginable reason for granting Wilson's Petition that is either "special" or "important". Accordingly, even if this Court has jurisdiction over Wilson's lawsuit, this Court should exercise its discretion to deny Wilson's Petition.

CONCLUSION

For the foregoing reasons, the Directors respectfully request that this Court deny Wilson's Petition.

Respectfully submitted,

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January 28, 1994

APPENDIX A

REPORT OF OKLAHOMA CORPORATION COMMISSION HEARING OFFICER, JANUARY 8, 1986

BEFORE THE CORPORATION COMMISSION

OF THE STATE OF OKLAHOMA

APPLICATION OF OKLAHOMA GAS AND ELECTRIC COMPANY FOR APPROVAL OF POWER SALES AGREEMENT WITH AES SHADY POINT, INC.	)))))	Cause No. PUD 000004

Hearing: 9:00 a.m. December 20, 1985

Appearances: Steven E. Moore and Robert D. Stewart, Jr., for Applicant, Oklahoma Gas and Electric Company
John B. O'Sullivan for AES Shady Point, Inc.
Shelton Benedict for the Oklahoma Corporation Commission Staff
William D. Mobley for the City of Poteau, Oklahoma
Cody B. Waddell for the Board of Regents of the University of Oklahoma

REPORT OF HEARING OFFICER

On August 12, 1985, Applicant, Oklahoma Gas and Electric Company (OG&E) filed its Application in this cause seeking approval pursuant to Rule 58(G) of this

Commission's Rules and Regulations Governing the Operations of Electric Utilities (Electric Rules) of a Power Sales Agreement executed by the parties as of July 22, 1985, by the terms of which OG&E would purchase power and energy from a qualifying cogeneration facility as defined by Section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA) (16 USC §796(18)(B)) proposed for construction by AES Shady Point, Inc., (AES-SP). On November 15, 1985, this Commission issued its Notice of Hearing assigning this cause for hearing on December 20, 1985, before a Hearing Officer, directing the Applicant to cause said Notice to be published as therein provided, and establishing the schedule for filing of prefiled testimony and exhibits. On November 27, 1985, AES-SP filed its Response and Petition for Waiver of Rule 58H of the Electric Rules which response urged approval of the contract made with OG&E. On December 4, 1985, OG&E filed its Notice of Intent to file Modified Power Sales Agreement accelerating the in-service date for the proposed facility and amending the rate structure to provide for substantial discounts to OG&E's ratepayers over the life of the Agreement. On December 16, 1985, the City of Poteau filed its Entry of Appearance in this cause supporting the proposed agreement and on December 19, 1985, the Board of Regents of the University of Oklahoma filed its Intervening Application. This cause came on for hearing as in said Notice provided and the undersigned Hearing Officer issues herewith his Report pursuant to Rule 21 of this Commission's Rules of Practice.

Facts

The facts presented to the Hearing Officer reflect that OG&E is an Oklahoma corporation having plant,

property and equipment dedicated to and for the production, transmission and distribution of electricity within the States of Oklahoma and Arkansas and is subject to the jurisdiction of this Commission by virtue of Article IX, Section 18, of the Constitution of the State of Oklahoma and 17 O.S. 1981 §§151, et seq. Due and proper notice of this proceeding was given and made as required by law and the Commission's Notice of Hearing and this Commission has jurisdiction to grant the relief requested in the Application by virtue of §§201 and 210 of PURPA, 17 O.S. 1981 §34.1 and Rule 58(G) of the Electric Rules.

Summary of Evidence

In support of its Application OG&E presented the testimony of Richard C. Day, Vice President of Marketing, who testified that, as reflected in the Application, OG&E had executed a contract to purchase electricity from a proposed 300 MW qualifying cogeneration facility to be located at Shady Point, Oklahoma. The contract as executed on July 22, 1985, contemplated an in-service date for the proposed facility in 1993. Mr. Day testified that as a result of the decision of this Commission in another cogeneration proceeding and in recognition of the desires of AES-SP and its steam user, Stone Container, Inc., Mr. Day testified that the parties had executed an Amended Power Sales Agreement with AES-SP which provides for an in-service date of the proposed facility in 1991, with levelized payments over the life of the contract which would result in substantial savings to OG&E's customers when compared to OG&E's full avoided costs. Mr. Day also testified that in the haste of the parties to execute an Amended Contract, AES-SP's interest coverage calculation contained an error

and the parties identified certain provisions of the Amended Agreement which required clarification and refinement to follow more closely the position of the Commission Staff with respect to cogeneration. Accordingly, the parties had executed an Amendment to the Amended Agreement and Mr. Day sponsored the introduction of Exhibit 20, the Amended Agreement and Exhibit 21, the Amendment to the Amended Agreement into this record.

In his testimony Mr. Day recognized the desire of AES-SP for a waiver of Rule 58(H) of this Commission's Electric Rules. He testified that if the Commission is satisfied that there is little risk to the ratepayers then the Commission should consider waiving Rule 58(H). At the same time, however, Mr. Day testified that waiver of the rule should be reciprocal: that is, the Commission should guarantee that OG&E will be allowed to flow the costs associated with purchasing electricity under this Agreement through the Fuel Adjustment Clause to the Oklahoma ratepayers.

Finally, Mr. Day testified that the Agreements made with AES-SP has many positive benefits to OG&E, to OG&E's customers, and to the economy of the State of Oklahoma. He, therefore, requested that the contract, as amended, be approved by the Commission.

On cross-examination, Mr. Day testified that if the Commission approves the Amended Agreement and grants a reciprocal waiver of rule 58(H), then the Commission in its Order should declare the last sentence of Section 14.1(c) of the Amended Agreement (Exhibit 20, pages 41-42) to be null and void.

For its first witness AES-SP called Mr. Roger W. Sant, President and Chief Executive Officer of Applied Energy Services, Inc. After testifying concerning his qualifications and the experience of his company in cogeneration projects throughout the United States, Mr. Sant testified concerning the Shady Point project, the facility from which OG&E proposes to purchase electricity under the contract presented here for approval. Mr. Sant stated that the project would employ circulating fluidized bed technology, be capable of burning high sulphur coal from Oklahoma, and would cost approximately $500 million to construct. The facility would provide steam to a facility that would strip carbon dioxide from the power plant fluegas and/or to Stone Container Corporation for a new plant to be located adjacent to the cogeneration facility.

AES-SP next presented Jeffrey R. Hamburg, Vice President of AES Shady Point, Inc., and an engineer for AES-SP. After establishing his professional qualifications Mr. Hamburg testified that the Shady Point facility is planned to consist of four circulating fluidized bed boilers, each fueled by coal and each producing 650,000 pounds per hour of steam. The steam from these boilers would be sent to a steam turbine generator which will produce a net of approximately 300 MW of electricity. The fluidized bed technology will allow the facility to burn high sulphur Oklahoma coal by injecting limestone into the boilers with the coal. He testified that AES-SP intends to burn Oklahoma coal so long as it is competitive in terms of price and adequacy of supply and use Oklahoma limestone in the boilers. Steam will be extracted from the turbine

generators and will be sent to process use in a carbon dioxide facility and/or a recycle paper mill. Mr. Hamburg testified that during construction of the plant it would employ an average of 500 people, and beginning in 1991 when the plant goes in service it would employ approximately 130 people on a fulltime basis. In addition, the paper mill will employ approximately 120 people. Mr. Hamburg testified that the facility at full output would result in approximately 200 new jobs in the coal industry resulting in $24 million additional income to the surrounding area and $15 million in income from services and materials each year. Direct and indirect benefits to the area, he testified, should result in $86 to $110 million in additional income each year. Total effect of increased wages and expenditures would lead to an increase of $3.3 billion in Oklahoma revenues over the next twenty years.

Mr. Hamburg testified that the contract with OG&E is unique in that OG&E will have governor control over the electrical output of the facility from the OG&E dispatch office subject only to AES-SP's ability to override for safety or emergency situations.

AES-SP next presented the testimony of Dr. Daniel D. Badger, a professor in Natural Resource Economics at Oklahoma State University. After testifying to his qualifications Dr. Badger testified generally about the area surrounding the site of the AES-SP project and advised the Commission concerning his analysis of the effect which construction and operation of the Shady Point facility will have on the economy in that area. In summary, Dr. Badger testified that the analysis done by AES-SP was

conservative and underestimated of the economic impact of this project in both jobs and dollars.

Mr. Dennis W. Bakke next testified for AES-SP in support of the project. Mr. Bakke testified that as the Executive Vice President and Chief Operating Officer of Applied Energy Services he supervises all activities of the company with special emphasis on negotiating the financing arrangements for the large scale cogeneration projects which AES builds and operates. Mr. Bakke testified that the agreement reached with OG&E would allow AES-SP to place its Shady Point facility in service in 1991 and that payments would be levelized throughout the term of the agreement so that OG&E's customers would experience a savings of $569 million in capacity costs and a savings of $521 million in energy costs when compared to the calculated avoided costs on the OG&E system and when compared to the rates which would have been paid under the July 22, 1985, agreement originally made with OG&E. Thus, total savings to the customers were calculated to exceed one billion dollars through the payments reflected to be made to AES-SP in the amended contract. Mr. Bakke further testified that in order to obtain project financing for the facility it would be necessary for the Commission to waive Rule 58(H) of the Electric Rules. In addition, he testified that the waiver of Rule 58(H) should be reciprocal so that OG&E would be allowed to recover the cost of electricity purchased under the agreement from OG&E's customers for the life of the agreement with AES-SP. In addition Mr. Bakke testified that in its Order the Commission should declare that the last sentence of Section 14.1(c) of the Amended Agreement (Exhibit 20, pages 41-42) is null and void. On cross-

examination Mr. Bakke testified that the present value of the discounts incorporated in the rates to be paid to AES-SP over the life of the contract equals $324 million. Staff counsel inquired whether the proposed eighteen month contingency for project financing as proposed by Mr. Schroeder would create difficulty for the project. In response Mr. Bakke testified that Mr. Schroeder's proposal to make the Commission's Order approving this agreement contingent upon securing financing would not present any major difficulty so long as the period allowed were eighteen months, but indicated that a shorter period would be troublesome because of the need to have all necessary permits secured and in place. In connection with the same point, Mr. Bakke also stressed the importance of making clear that final effectiveness of the Commission's Order would be automatic if the conditions were met.

AES-SP prefiled the testimony of Mr. David A. Behnke of Morgan Guaranty Trust Company of New York in support of AES-SP's request for waiver of Rule 58(H) of the Electric Rules. Counsel for AES-SP advised the Hearing Officer that at the last minute Mr. Behnke had been unable to attend the hearing. Mr. Behnke's prefiled testimony was marked for identification on the record as Exhibit 9. Counsel for all parties stipulated that had Mr. Behnke appeared at the hearing his testimony would have been substantially as contained in Exhibit 9, and based upon the stipulation of the parties the Hearing Officer admitted Exhibit 9 as fully as though the same had been presented by the witness in open court. Mr. Behnke testified that based upon his understanding that the Shady Point facility would be financed using some form of project financing it would be extraordinarily difficult if not

impossible to secure this form of financing without a waiver of Rule 58(H) because lenders require that the project revenue stream be very secure and predictable. Rule 58(H) poses a threat to the security and predictability of that revenue stream and any power sales contract containing the Rule 58(H) clause would be virtually impossible to finance on a limited recourse project finance basis.

Mr. Larry A. Schroeder, Department Head of Rate Analysis, Statistics and Research, testified on behalf of the Commission Staff. Mr. Schroeder's testimony contained three recommendations:

> First, that the agreement, as amended, between OG&E and AES-SP be approved including the levelizing concept contained in the Agreement;
>
> Second, that the Commission waive Rule 58(H) of the Electric Rules on a reciprocal basis so that the revenue stream for the project would be more secure and predictable and that once approved OG&E would be allowed to recover payments made to AES-SP from its Oklahoma customers for the term of the agreement; and
>
> Third, that the Order approving the agreement be temporary for eighteen months pending a showing that financing is committed for the project.

Mr. Schroeder testified that the Staff is pleased with the agreement which OG&E and AES-SP seek to have approved in this proceeding. He recognized that the

agreement had been achieved with little or no Commission Staff involvement and that the levelized payment structure would assure that over the life of the Agreement OG&E's customers would experience substantial savings compared to OG&E's calculated full avoided costs. The benefits to the ratepayers clearly make the ratepayers better off on a total life cycle cost basis.

Mr. Schroeder testified that Rule 58(H) of the Electric Rules should be waived if the Commission can determine that the risk to the ratepayer relative to alternatives available to OG&E to supply a like amount of power over the same period is minimal. The assessment of risk should involve price and non-price considerations. The discounts built into the contract with AES-SP minimize the price considerations. Non-price considerations include such matters as projected facility performance and overall viability. Mr. Schroeder testified that these performance standards can best be enforced through specific contract terms. Mr. Schroeder also testified that financiabiltiy *[sic]* of the project is also relevant in determining whether to waive Rule 58(H) and he expressed his personal belief that the financial community would not accept a contract containing language which would allow rates to be changed by a subsequent Commission order.

Finally, Mr. Schroeder expressed some concern because of the long lead time between Commission action and projection completion. Accordingly, he testified that OG&E should be required to keep the Commission informed of the project status relative to the Power Sales Agreement benchmarks. In addition, Mr. Schroeder recommended that the Order Approving this contract be

temporary for eighteen months and that it become permanent by a showing that project financing had been obtained. During cross-examination Mr. Schroeder agreed that the Order could be written so that the Order would become permanent with the filing of appropriate documents to establish that project financing had been obtained, and also agreed that the failure to meet the eighteen month deadline would not necessarily mean loss of Commission approval of the amended contract. Mr. Schroeder testified in this connection that if the project seemed to be progressing towards financing and completion and would be capable of entering service before OG&E needed its capacity, the Commission should treat a request for an extension of the eighteen month deadline favorably.

Findings and Conclusions

Based upon the foregoing summary of the evidence and the testimony and exhibits presented during the hearing, the Hearing Officer makes the following findings and conclusions:

1. On July 22, 1985, OG&E and AES-SP executed a Power Sales Agreement which was subsequently amended on December 10, 1985, and on December 19, 1985, by the terms of which OG&E agrees to purchase electricity from a 300 MW qualifying cogeneration facility to be located in the vicinity of Shady Point, Oklahoma, on a tract of land located in LeFlore County as set forth in the Agreement. The term of the Agreement is 32 years, but OG&E has the right to terminate the Agreement at the end of the seventeenth, twenty-second and twenty-seventh years as therein

provided. The rates for purchase of the electricity are stated with certainty throughout the term of the agreement and the delivery of power and energy will be made through OG&E's direct control.

2. Approval of the agreement tendered in these proceedings, based upon the uncontroverted evidence presented, will result in direct savings to ratepayers of OG&E of approximately $1,090,000,000, which amount is built into the rates contained in the agreement and these savings have a present value of $324 million. In addition, construction and operation of the facility will have a substantial economic impact on the four-county area adjacent to the location of this facility.

3. Ample justification exists on this record to grant a waiver of Rule 58(H) of the Electric Rules. The risks to the ratepayers as testified by Mr. Schroeder are minimal while retention of the Rule 58(H) language will seriously jeopardize and will probably preclude project financing. Waiver of this rule should be made reciprocal so that the rates paid to AES-SP by OG&E throughout the terms of the agreement are recovered immediately by OG&E from its Oklahoma jurisdictional customers. In addition, the last sentence of Section 14.1(c) of the Agreement should be declared to be null and void.

4. Staff has expressed the concern that because of the long lead time before this project becomes operational OG&E should monitor the progress of this project closely. It is clear from the agreement made that OG&E is aware of this need and has recognized this need by providing benchmarks along the critical construction

path. OG&E should keep the Commission fully advised of the progress of this project as it proceeds through construction.

5. This project will avoid 300 MW of baseload capacity which OG&E would have built to meet the needs of its customers. A critical determinant in whether the project is built is whether the facility can be financed. The Order approving the Agreement, assuming the first recommendation of the Hearing Officer is accepted, should be conditioned upon AES-SP securing project financing within eighteen months after the date of the Order. The condition should be satisfied by filing with the Director of the Public Utilities Division of this Commission, a letter from the financing entity or entities reflecting that project financing for the AES Shady Point project has been approved and that funds will be available to be drawn against after a date certain to begin paying for construction of the project. In all other respects the Order approving this agreement should be final and complete for all purposes except for the continuing opportunity to review and extend the time available for financing in the event that the eighteen month period becomes inadequate.

RECOMMENDATIONS

Based upon the foregoing findings and conclusions the Hearing Officer makes the following recommendations to the Commission.

First, that the Agreement between OG&E and AES-SP, as amended, be approved by the Commission as being

in the best interests of the parties, OG&E's customers and the State of Oklahoma.

Second, that in the Order approving this Agreement, the Commission specifically waive Rule 58(H) of its Electric Rules on a reciprocal basis so that AES-SP can be assured of the payments it will receive under the Agreement as negotiated and OG&E can be assured that payments made to AES-SP will be immediately recoverable from OG&E's customers through the term of the Agreement.

Third, that the last sentence of Section 14.1(c) of the Agreement (Exhibit 20, pages 41-42) be specifically declared by the Commission to be null and void.

Fourth, that OG&E be directed to report to the Director, Public Utilities Division, on a periodic basis concerning the progress of this project as that progress relates to construction benchmarks contained in the Agreement.

Fifth, that the Order approving this Agreement be conditioned upon AES-SP obtaining project financing within 18 months of the date of the Commission's Order. This condition should be satisfied automatically by the filing with the Director of the Public Utilities Division of this Commission of a letter from the financing entity or entities reflecting that project financing for the AES Shady

Point project has been approved and that funds will be available to be drawn against after a date certain.

Dated this 8th day of January, 1986.

Respectfully submitted,

/s/ Lee W. Cook

Lee W. Cook
Hearing Officer

APPENDIX B

OKLAHOMA CORPORATION COMMISSION ORDER ADOPTING REPORT OF HEARING OFFICER, FEBRUARY 27, 1986

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICATION OF	)	CAUSE NO. PUD 000004
OKLAHOMA GAS AND	)	
ELECTRIC COMPANY FOR	)	
APPROVAL OF POWER	)	
SALES AGREEMENT WITH	)	
AES SHADY POINT, INC.	)	ORDER NO. 293731

Hearings: December 20, 1985, on the merits, before Lee W. Cook, Hearing Officer

February 18, 1986, Appeal to Report of Hearing Officer and Motions to Dismiss, before the Commission en banc.

Appearances: See Official Record

BY THE COMMISSION:

The Oklahoma Corporation Commission being regularly in session, and the undersigned Commissioners being present and participating, the above-styled cause comes on for consideration and order.

DISCUSSION AND FINDINGS

This cause was heard on December 20, 1985, and the Report of the Hearing Officer was filed on January 8, 1986. On January 18, 1986, Commonwealth Power Management (CPM) filed its Appeal to the Report of the Hearing Officer. Oklahoma Gas and Electric Company (OG&E) and AES-Shady Point, Inc. (AES) filed Motions to Dismiss the CPM Appeal on January 24, 1986, and January 31, 1986, respectively. After proper notice, the CPM Appeal and Motions to Dismiss were heard February 18, 1986. We issued our Order No. 293570 on February 25, 1986, and granted the Motions to Dismiss without ever reaching the merits of CPM's Appeal.

After a full and complete review of the record in this cause, we find that the Power Sales Agreement (PSA) between OG&E and AES, submitted for our approval pursuant to Rule 58(G) of our General Rules of Practice, should be approved. We find that the rates set forth in the PSA are fair, just and reasonable, are in the best interests of the ratepayers, and are not discriminatory against either AES or OG&E.

We further find that the Report of the Hearing Officer accurately sets forth the evidence received at the hearing on the merits and that his recommendations should be adopted in their entirety.

ORDER

IT IS THEREFORE ORDERED that the PSA submitted for our approval be and it is hereby approved in its entirety.

IT IS FURTHER ORDERED that the Report of the Hearing Officer be and it is hereby adopted in its entirety, the same being attached hereto as Exhibit A and incorporated herein by reference.

CORPORATION COMMISSION
OF OKLAHOMA

/s/
HARRY BAKER, Chairman

/s/
NORMA EAGLETON,
Vice Chairman

/s/
JAMES B. TOWNSEND,
Commissioner

DONE AND PERFORMED this 27 day of February, 1986.

BY ORDER OF THE COMMISSION:

/s/
A.W. LILLY, Secretary Assistant

APPENDIX C

ORDER OF THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA MARCH 21, 1989

IN THE DISTRICT COURT IN AND FOR MUSKOGEE COUNTY

STATE OF OKLAHOMA

CHARLES D. "CHARLEY" WILSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. C-88-1800
	)	
JAMES G. HARLOW, JR.,	)	
G.W. "BILL" SWISHER, JR.,	)	
JOHN F. SNODGRASS, MARTHA W.	)	
GRIFFIN, JOHN A. TAYLOR,	)	
HERBERT H. CHAMPLIN, WILLIAM	)	
D. LITTLE, JR., F. DAIL HARPER,	)	
and HUGH L. HEMBREE, III,	)	
	)	
Defendants.	)	

ORDER DISMISSING PETITION FOR LACK OF JURISDICTION

On December 19, 1988, the plaintiff filed his petition against the members of the board of directors of Oklahoma Gas and Electric Company, seeking in a class

action $538,898,000.00 (later amended to $532,898.00 and to an amount in excess of $10,000.00) in damages predicated on allegations in tort of the defendants' gross negligence and/or intentional wrongdoing in subjecting OG&E ratepayers to the burden of financing the costs of OG&E's contract with AES Shady Point, Inc., pursuant to the federal Public Utility Regulatory Policies Act of 1978, for production and purchase of electricity from a congeneration plant, which contract had been approved by orders of the Oklahoma Corporation Commission dated February 27, 1986, and July 10, 1987.

On January 9, 1989, the defendants filed their Motion for Change of Venue on Forum Non Conveniens and their Motion to Dismiss.

On February 23, 1989, the representative plaintiff appearing with his attorney, Mr. Whit Pate, and the defendants appearing with their attorney, Mr. H.D. Binns, Jr., the defendants' dismissal motion was presented to the Court and taken under advisement pending the filing of supplemental briefs.

Now fully advised, the Court adopts the brief of the defendants insofar as it supports dismissal on the ground of lack of jurisdiction over the subject matter of the action, especially Okl.Const.Art.9, §§ 18,20 and 24; WOODS PETROLEUM CORP. v. SLEDGE, Okl., 632 P.2d 393 (1981); CONTINENTAL TEL. CO. OF OKLAHOMA v. HUNTER, Okl., 590 P.2d 667 (1979).

The petition is dismissed for lack of subject-matter jurisdiction this 21st day of March, 1989.

/s/
James E. Edmondson
District Judge

APPENDIX D

MEMORANDUM OPINION OF THE COURT OF APPEALS OF OKLAHOMA, DIVISION 4 NOVEMBER 6, 1990

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

CHARLES D. "CHARLEY" WILSON, Appellant,	)	
vs.	)	No. 72,951
JAMES G. HARLOW, JR., G. W. "BILL" SWISHER, JR., JOHN F. SNODGRASS, MARTHA W. GRIFFIN, JOHN A. TAYLOR, HERBERT H. CHAMPLIN, WILLIAM D. LITTLE, JR., F. DAIL HARPER, and HUGH L. HEMBREE, III, Appellees.	)	NOT FOR PUBLICATION

APPEAL FROM THE DISTRICT COURT
OF MUSKOGEE COUNTY, OKLAHOMA

Honorable James E. Edmondson, Trial Judge

MEMORANDUM OPINION

BACON, P. J.

This is an appeal by Wilson from the trial court's dismissal of his suit against the board of directors of

Oklahoma Gas and Electric Company on the grounds it lacked subject matter jurisdiction.

During the energy crisis in 1978, Congress enacted legislation which encouraged the construction of cogeneration plants for the generation of electricity which the local utility would be required to buy at a cost not to exceed the cost to the utility if it generated the electricity itself or if purchased from another source. Pursuant to the federal act, Oklahoma enacted implementary legislation giving the Oklahoma Corporation Commission authority to administer the federal energy conservation program. 17 O.S. 1981 § 34.1.

In early 1986 AES Shady Point, Inc., and OG&E entered into a contract wherein AES would construct a coal-fired cogeneration plant in LeFlore County and OG&E would purchase the electricity produced by the plant. The Corporation Commission approved the power sales agreement between AES and OG&E on February 27, 1986, and made this order final on July 10, 1987, when AES had obtained the requisite financing.

The cost of the electricity purchased by OG&E from AES would include the cost of (1) the plant, (2) the operation of the plant, and (3) the fuel, which was projected at $523,898. These costs would be passed through to OG&E's customers under the fuel adjustment clause.

Wilson, a purchaser of electricity from OG&E, filed this action on December 19, 1988, seeking damages of more than $10,000, alleging that the defendants, members of OG&E's board of directors, were wilfully and wantonly

negligent in failing to terminate the contract with AES based on testimony of Patrick J. Ryan, OG&E's executive vice president and chief operating officer, before the Oklahoma Corporation Commission in October 1988.

Ryan testified that for the first time in its history OG&E was losing customers; that it could purchase surplus electric power from other sources at less than its own production costs; and that it was now possible to construct gas-fired plants at one-third of the cost of coal-fired generating plants.

Appellees filed a motion to dismiss for lack of subject matter jurisdiction on January 9, 1989. A hearing on the motion was conducted by the trial court on February 23, 1989, followed by an order dismissing the petition for lack of jurisdiction on March 21, 1989.

Appellant Wilson filed a timely appeal from this order, arguing that he had filed a common-law action of negligence against the appellees for failing to terminate the contract with AES when it became apparent that the additional electric power was not needed, or if additional electric power was needed, it could be procured at a cost below that provided for under the power sales agreement with AES.

Appellees, on the other hand, cast Wilson's action as a quest for a refund to OG&E's customers. Admittedly 17 O.S.1981 § 121 vests the Corporation Commission with sole power as to refunds and reparations, while Art. 9 §§ 18 and 24 of the Oklahoma Constitution vest original jurisdiction over rate making with the Commission.

However, an action for damages for loss of profits, fraud and other proper negligence claims exists in the district courts. Continental Telephone Company of Oklahoma, Inc. v. Hunter, 590 P.2d 667 (Okla. 1979).

Nowhere in the record before us does it disclose that any payments have been made by OG&E to AES under the power sales agreement and passed through to OG&E's ratepayers through the fuel adjustment clause. Absent such payments by OG&E to AES and a rate increase to OG&E's customers through the fuel adjustment clause, a refund by OG&E to its ratepayers would be impossible.

Nor does this action constitute a collateral attack on an order of the Corporation Commission. Woods Petroleum Corp. v. Sledge, 632 P.2d 393 (Okla. 1981). Rather, it is a suit for damages against the directors of OG&E for negligence and breach of their fiduciary duty by failing to take action when it became apparent that OG&E did not need the additional capacity of the AES cogeneration plant and could acquire additional surplus electric power, if needed, at a lower cost. Hargrave v. Canadian Valley Electric Cooperative, Inc., 792 P.2d 50 (Okla. 1990).

The order of the trial court is REVERSED and the cause is REMANDED to the district court for further proceedings.

RAPP, J., and STUBBLEFIELD, J., concur.

APPENDIX E

ORDER OF THE SUPREME COURT OF OKLAHOMA MARCH 5, 1991

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, March 5, 1991

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

72,951 Charles D. "Charley Wilson v. James G. Harlow, Jr. et al. **Certiorari denied**.

CONCUR: Opala, C.J., Hodges, V.C.J., Lavender, Simms, Doolin, Hargrave, Wilson, Summers, JJ.

Marion P. Opala /s/
Chief Justice

APPENDIX F

ORDER OF THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA OCTOBER 4, 1991

IN THE DISTRICT COURT IN AND FOR MUSKOGEE COUNTY

STATE OF OKLAHOMA

CHARLES D. "CHARLEY" WILSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. C-88-1800
	)	
JAMES G. HARLOW, JR.,	)	
G.W. "BILL" SWISHER, JR.,	)	
JOHN F. SNODGRASS, MARTHA W.	)	
GRIFFIN, JOHN A. TAYLOR,	)	
HERBERT H. CHAMPLIN, WILLIAM	)	
D. LITTLE, JR., F. DAIL HARPER,	)	
and HUGH L. HEMBREE, III,	)	
	)	
Defendants.	)	

ORDER

On September 19, 1991, the defendants filed their Amended Motion to Dismiss Plaintiff's Petition for Lack of Jurisdiction Over The Subject Matter Of The Action,

Failure To State A Claim Upon Which Relief Can Be Granted, Because Plaintiff Is Estopped From Litigating Issues Which Render The Claims Of Plaintiff Defective, And Further Failure Of Plaintiff To Join Indispensable Parties. On September 30, 1991, the plaintiff filed his Response.

On October 2, 1991, the parties appeared with or by their attorneys of record and submitted the issues presented by the dismissal motion for resolution on the briefs, exhibits and record provided.

The Court holds as follows:

The class action ratepayer petition claims that the defendants, as directors of the Oklahoma Gas and Electric Company, have failed to perform a clear legal duty to cancel an unnecessary and exorbitantly expensive contract to purchase electricity from a coal-fired cogeneration plant, and that such failure constitutes a breach of the directors' fiduciary duty to the company's customers amounting to a tortious and wanton act of negligence to the detriment of the class.

The petition states a cause of action upon which relief can be granted, and the district court has jurisdiction of it. Art.IX, § 24, Okl.Const.; HARGRAVE v. CANADIAN VALLEY ELECTRIC COOPERATIVE, INC., 792 P.2d 50 (Okl.1990); CONTINENTAL TELEPHONE COMPANY v. HUNTER, 590 P.2d 667 (Okl.1979); SOUTHWESTERN NATURAL GAS COMPANY v. CHEROKEE PUBLIC SERVICE COMPANY, 44 P.2d 945 (Okl.1935).

Further, the plaintiff is not estopped from bringing the action by the fact that he thereafter sought relief in other forms and thus far has not prevailed.

Finally, the plaintiff need not join either the Oklahoma Corporation Commission or the Federal Energy Regulatory Commission as a party to his action, and his decision not to do so is not a basis for dismissal.

The defendants' amended motion to dismiss is denied this October 4, 1991.

/s/
JAMES E. EDMONDSON
DISTRICT JUDGE

APPENDIX G

ORDER OF THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA OCTOBER 17, 1991

IN THE DISTRICT COURT WITHIN AND FOR MUSKOGEE COUNTY

STATE OF OKLAHOMA

CHARLES D. "CHARLEY" WILSON,

v. Case No. C-88-1800

JAMES G. HARLOW, JR.,

COURT MINUTE

The defendants' Second Amended Motion to Dismiss is denied. cc: Whit Pate, Hugh D. Rice, James G. Wilcoxen, Peter D. Clarke

October 17, 1991
DATE

J.E. Edmundson /s/
JUDGE

APPENDIX H

ORDER OF THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA DECEMBER 16, 1991

IN THE DISTRICT COURT IN AND FOR MUSKOGEE COUNTY

STATE OF OKLAHOMA

CHARLES D. "CHARLEY" WILSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. C-88-1800
	)	
JAMES G. HARLOW, JR., G.W. "BILL" SWISHER, JR., JOHN F. SNODGRASS, MARTHA W. GRIFFIN, JOHN A. TAYLOR, HERBERT H. CHAMPLIN, WILLIAM D. LITTLE, JR., F. DAIL HARPER, and HUGH L. HEMBREE, III,	)	
	)	
Defendants.	)	

ORDER

On November 25, 1991, the above defendants submitted their alternative motions to dismiss and to certify for interlocutory appeal, and the Court granted the parties

until December 6, 1991, to supplement their pleadings and briefs. The parties have timely supplemented the record and the defendants have requested further oral argument on the issue of federal preemption.

The Court now denies the request for further oral argument, and denies the defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction Based on Federal Preemption and the Filed Rate Doctrine.

However, the Court grants the defendants' request for an order certifying for interlocutory appeal its instant rulings and its preceding rulings on the questions of estoppel, statement of a claim upon which relief can be granted, and joinder of additional parties; and the Court invites submission by the defendants within ten days of a conforming order, upon the entry of which trial-level proceedings herein will be stayed pending appellate disposition of said order.

SO ORDERED December 16, 1991.

/s/
JAMES E. EDMONDSON
DISTRICT JUDGE

APPENDIX I

ORDER OF THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA DECEMBER 23, 1991

IN THE DISTRICT COURT IN AND FOR MUSKOGEE COUNTY

STATE OF OKLAHOMA

CHARLES D. "CHARLEY" WILSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. C-88-1800
	)	
JAMES G. HARLOW, JR., G.W. "BILL" SWISHER, JR., JOHN F. SNODGRASS, MARTHA W. GRIFFIN, JOHN A. TAYLOR, HERBERT H. CHAMPLIN, WILLIAM D. LITTLE, JR., F. DAIL HARPER, and HUGH L. HEMBREE, III,	)	
	)	
Defendants.	)	

ORDER CERTIFYING ORDERS AND QUESTIONS FOR INTERLOCUTORY APPEAL

James G. Harlow, Jr., G.W. "Bill" Swisher, Jr., John F. Snodgrass, Martha W. Griffin, John A. Taylor, Herbert H. Champlin, William D. Little, Jr., F. Dail Harper and Hugh L. Hembree, III (the "Defendants") filed herein their

Motion for Order Certifying Orders for Interlocutory Appeal ("Motion to Certify") and Motion to Stay Proceedings Pending Interlocutory Appeal ("Motion to Stay") to which Charles D. "Charlie" Wilson ("Plaintiff") responded. Defendants and Plaintiff have fully briefed the issues framed by Defendants' Motion to Certify and Motion to Stay, oral argument was had thereon and supplemental briefs filed by the Plaintiff and Defendants' counsel.

The Court, after being fully advised in the premises, finds that the orders entered herein by the Court on the 4th day of October, 1991, denying Defendants' Amended Motion to Dismiss, on the 17th day of October, 1991 denying Defendants' Second Amended Motion to Dismiss, and on the 16th day of December, 1991 denying Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction Based on Federal Preemption (the "Orders") should be certified to the Supreme Court of the State of Oklahoma pursuant to 12 O.S. 1981 §952(b)(3) and Rule 1.50, et seq., Rules - Appellate Procedure and Civil Cases promulgated by the Supreme Court of the State of Oklahoma. The Court finds that the Orders are appropriate for certification for the reason that the issues determined by the Orders affect a substantial part of the merits of the controversy and that an immediate appeal may materially advance the ultimate termination of the litigation.

Therefore, the Court further finds that Defendants' Motion to Certify and Motion to Stay should be granted.

IT IS ORDERED, ADJUDGED AND DECREED that the Defendants' Motion to Certify be, and the same is hereby granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Orders and following issues determined by the Orders affect a substantial part of the merits of the controversy and it is hereby certified that an immediate appeal from the Orders may materially advance the ultimate termination of the litigation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following issues are hereby certified for Interlocutory Appeal to the Oklahoma Supreme Court as follows:

1. Whether this Court lacks subject matter jurisdiction based on federal preemption; and

2. Whether Plaintiff is estopped from relitigating issues herein determined adversely to Plaintiff in prior actions; and

3. Whether the Petition, as amended, states a claim upon which relief can be granted; and

4. Whether Plaintiff has failed to join the Oklahoma Corporation Commission and the Federal Energy Regulatory Commission as indispensable parties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants' Motion to Stay be and the same is hereby granted and that the proceedings herein will be stayed pending appellate disposition of this order certifying the following for interlocutory appeal to the Oklahoma Supreme Court.

ORDERED this 23rd day of December, 1991.

/s/
JAMES. E. EDMONDSON
District Judge, Muskogee County

APPENDIX J

ORDER OF THE SUPREME COURT OF OKLAHOMA JUNE 11, 1992

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Thursday, June 11, 1992

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

78,917 Charles D. "Charlie" Wilson v. James G. Harlow, Jr., G.W. "Bill" Swisher, Jr. et al.

79,192 James C. Harlow, Jr. et al. v. James E. Edmondson, District Judge, Muskogee County.

Petition for writ of certiorari to review an interlocutory order is denied; application to assume original jurisdiction is denied; motion to consolidate denied.

CONCUR: Opala, C.J., Hodges, V.C.J., Lavender, Simms, Hargrave, Wilson, Watt, JJ.

CONCUR IN PART; DISSENT IN PART: Kauger, Summers, JJ.

Marion P. Opala /s/
CHIEF JUSTICE

APPENDIX K

ORDER OF THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA JULY 13, 1992

IN THE DISTRICT COURT OF MUSKOGEE COUNTY

STATE OF OKLAHOMA

CHARLES D. "CHARLEY" WILSON

Plaintiff

vs No. C-88-1800

JAMES G. HARLOW, JR., et al

Defendants

ORDER DETERMINING THAT CAUSE BE MAINTAINED AS CLASS ACTION

The motion of plaintiff for a determination that this cause be maintained as a class action comes on for hearing July 13, 1992. The parties appear through their respective counsel. The court hears counsel's argument on the question. Having heard such argument, examined and considered all pleadings, motions, responses, and exhibits, the court finds as follows:

1. The class represented by plaintiff shall consist of:

"All Oklahoma ratepayers (customers) of Oklahoma Gas and Electric Company, a public utility, that have, as reflected by the billing records of such utility, been billed for electrical service by such public utility from January 1, 1991, to the date that the initial NOTICE TO CLASS MEMBERS is henceforth approved and issued in this action."

Note: The court is aware that, depending upon time and proof, the above set forth delineation of the class may have to to (sic) be modified as to future ratepayers becoming members of the class prior to a final judgment in the cause but for now, at least, the above set forth membership of the class is proper and will suffice for the purposes of this action.

2. The prerequisites of Title 12 OS § 2023 are present in this case and plaintiff has met the burden of proof called for in that:

a. The class, which exceeds some 600,000 Oklahoma ratepayers, on the OG&E system is so numerous that joinder of all such members is impracticable.

b. There are questions of law or fact common to the class.

c. The claims of the representative party are typical of the claims of the class.

d. The representative party will fairly and adequately protect the interest of the class.

3. As to the provisions of Title 12 OS § 2023 B, the court finds this action may be maintained as a class action in that plaintiff has met his burden of proof by convincing the court the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to any other available methods for the fair and efficient adjudication of the controversy.

It is therefore ordered that this action shall be maintained as a class action pursuant to the provisions of Title 12 OS § 2023.

Ordered entered this 13th day of July, 1992.

James E. Edmondson/s/
DISTRICT JUDGE